83-213

No. 83-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN, INC., et al.,

—and—

PATRICIA PARISI, et al.,

Petitioners,

—v.—

HUGH L. CAREY, individually and as Governor of the State of New York, et al.,

Respondents.

UNITED STATES OF AMERICA,

Amicus Curiae

PETITION FOR A WRIT OF *CERTIORARI* TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

ARCHIBALD R. MURRAY
KALMAN FINKEL
JOHN E. KIRKLIN
RICHARD F. BRAUN
HELEN HERSHKOFF
Legal Aid Society
11 Park Place
New York, New York 10007
(212) 227-2755

Of Counsel:
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
By: Jonathan D. Siegfried
Elisa M. Rivlin
345 Park Avenue
New York, New York 10154
(212) 644-8277

CHRISTOPHER A. HANSEN
(*Counsel of Record*)
ROBERT M. LEVY
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011
(212) 924-7800

MICHAEL S. LOTTMAN
MURRAY B. SCHNEPS
299 Broadway
Suite 805
New York, New York 10007
(212) 267-0760

WALTER C. REDFIELD
1290 Avenue of the Americas
Suite 4150
New York, New York 10104
(212) 977-9500

Questions Presented

1. Whether the decision of the Court of Appeals for the Second Circuit is in conflict with the controlling prior decisions of this Court, particularly United States v. Swift & Co., 286 U.S. 106 (1932), in that it permits defendant State officials to modify a final consent judgment upon an unclear standard of "especially great generosity" and opens the door to endless litigation of mental retardation and other complex matters?

2. Whether the decision of the Court of Appeals for the Second Circuit applies this Court's decision in Youngberg v. Romeo, ___ U.S. ___, 73 L. Ed. 2d 28 (1982), in such a way as to depart from the usual and accepted course of judicial proceedings, in that it improperly

restricts the fact-finding and remedial authority of the district courts and requires them uncritically to acquiesce in the clinical and non-clinical views of defendant State officials at all stages of litigation?

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

No. 83-____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN, INC., et al.,

-and-

PATRICIA PARISI, et al.,
Petitioner,

v.

HUGH L. CAREY, individually and as Governor of the State of New York, et al.,

Respondent.

UNITED STATES OF AMERICA,

Amicus Curiae.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE
SECOND CIRCUIT

Petitioners, members of the plaintiff-appellee class below,* respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this proceeding on March 31, 1983.

---

* The parties to the proceedings below, in addition to those named in the caption, included the following named plaintiffs-appellees: Benevolent Society for Retarded Children, Willowbrook Chapter of the New York State Association for Retarded Children; Lara R. Schneps, by her father Murray B. Schneps; Nina Galin, by her mother Diana Lane McCourt; Anthony Rios, by his father Jesus Rios; David Amoroso, by his mother Rosalie Amoroso; Rose Evelyn Cruz, by her father Francisco M. Cruz; Barry Friedman, by his father Melvin Friedman; Lowell Scott Isaacs, by his father Jerome W. Isaacs; Antoinette Magri, by her mother Sandra Magri; Anselmo Clarke, by his mother Estella Clarke; Nelson Agosto, by his aunt and next friend Lucilia DeJesus; Frances Breen, by his sister Mary Morganstern as committee of her person and property; John Duffy, by his next friend Robert L. Feldt, Esq.; Evelyn Cruz, by her father Francisco Cruz; Bonnie Rose, by her mother Anne

(Continued)

OPINIONS BELOW

The opinion of the Court of Appeals dated March 31, 1983 (No. 82-7741, 82-7591), is reported at 706 F.2d 956, and the opinion and order of the District Court which it in part reverses, dated April 28, 1982, is reported at 551 F. Supp. 1165. Copies are included in the appendix to this petition.

(Continued)

Rose; Mario Narvaez, by his mother Carmen Narvaez; John Doe, by his mother Jane Doe; and Steven Rosepka, by his father Ben Rosepka. (Patricia Parisi sues through her mother Lena Stevernagel.) Additional defendants-appellants below included Zygmond L. Slezak, Commissioner, New York State Office of Mental Retardation and Developmental Disabilities; Thomas Shirtz, Deputy Commissioner, OMRDD; and Ella A. Curry, Director, Frances Ryan, Deputy Director, Clinical Services, and James Walsh, Deputy Director, Institutional Administration, Staten Island Developmental Center (Willowbrook). NYSARC, Inc., the only corporation, has no parent companies, subsidiaries or affiliates.

JURISDICTION

As noted above, the opinion and judgment sought to be reviewed was filed in the Court of Appeals on March 31, 1983. A petition for rehearing and for en banc reconsideration was timely filed in accordance with F.R. App. P. 35 and 40, and was denied on May 9, 1983. A copy of this denial is included in Appendix B to this petition. This petition for a writ of certiorari is filed within the 90 days authorized in 28 U.S.C. 2102(c). Sup. Ct. R. 20.2. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . . . U.S. Const., Amend. 14, § 1.

STATEMENT OF THE CASE

This is one of the most important lawsuits ever brought on behalf of

mentally retarded individuals. It was instituted in 1972 under 42 U.S.C. 1983* on behalf of the 5,200 mentally retarded residents then at the Willowbrook State School, a public institution for the mentally retarded on Staten Island, New York, and against the New York State officials responsible for the deplorable conditions that existed there. On April 30, 1975, the District Court approved a detailed and painstakingly negotiated Consent Judgment. New York State Association for Retarded Children, Inc. v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975). Of primary importance was the requirement that Willowbrook be reduced to no more

---

* The District Court had jurisdiction over this civil rights case pursuant to, inter alia, 28 U.S.C. 1331 and 1343(3) and (4). See Final Judgment on Consent, April 30, 1975 ("the Consent Judgment"), at ¶ 1. Appendix D to this Petition at D-2.

than 250 beds by April 30, 1981, by means of relocating residents into "community placements," defined as non-institutional residences of no more than ten beds for all but the most capable adult clients. Consent Judgment, Section V(4) at D-5.* By this provision,** the framers of the Consent Judgment sought not simply to free plaintiff class members from the

---

* Respondent-defendants reaffirmed their commitment to community placement (as so defined) in subsequent consent orders issued on March 10, 1977 (resolving a contempt motion alleging widespread noncompliance with the original judgment) and again on September 15, 1978. Later, the parties agreed that for the severely retarded and multiply handicapped class members housed in the Flower Hospital in Manhattan, even smaller placements, of between three and six beds, were appropriate. Order of October 22, 1979 ("the Flower order"). Appendix E to this petition.

** The full definition of a community placement was

(continued)

horrors of Willowbrook, but also to ensure that they would not be shunted to other institutional settings where the conditions which led to Willowbrook would inexorably be duplicated.

This case is now before this Court because of a decision by the Court of Appeals for the Second Circuit which threatens to undo the Consent Judgment's effort to eradicate the evils of Willowbrook simply because the state has changed its mind. The decision could end the search for settlement in complex cases, creating instead a situation where no

---

(continued)

> a non-institutional residence in the community in a hotel, halfway house, group home, foster care home, or similar residential facility of fifteen or fewer beds for mildly retarded adults, and ten or fewer beds for all others, coupled with a program element adequate to meet the resident's individual needs.

Consent Judgment, Section V(4) at D-5.

judgment is ever really final. Further, by its misapprehension of this Court's holding in Youngberg v. Romeo, ___ U.S. ___, 73 L.Ed. 2d 28 (1982), the Court of Appeals decision would require district courts to rubber stamp any opinion expressed by State officials at every stage of mental retardation and perhaps other types of cases.

The District Court's Decision

In May, 1981, petitioners moved in the District Court to hold respondents in noncompliance with every major provision of the Consent Judgment. At the same time, respondents sought to modify the above mentioned community placement provisions so as to allow placement of class members into 50-bed institutions -- precisely the opposite of the relief guaranteed by the Judgment. After a 25-day trial, the District Court held,

Opinion and Order of April 28, 1982 ("D.C. Opinion") Appendix C to this Petition at C-15 - C-48, and the Court of Appeals affirmed, Opinion of March 31, 1983 ("C.A. Opinion") Appendix A to this Petition at A-12 - A-14, that class members in Willowbrook and other institutions were still being subjected to filthy and unsanitary conditions, deprived of proper clothing and staff protection, and provided with little, if any, habilitative programming.* Significantly, the trial court found these same deficiencies in the existing 50-bed institutions (either established prior

---

* On the basis of these findings, the District Court also decided to appoint a Special Master to monitor respondents' future performance, D.C. Opinion at C-48 - C-64, and the Court of Appeals again affirmed. C.A. Opinion at A-14 - A-20. Petitioners do not seek review of these holdings, except insofar as the Court of Appeals indicated that its interpretation of Youngberg v. Romeo, supra, would apply to future activities of the master. C.A. Opinion at A-20.

to the Consent Judgment or housing only non-class members) which respondents put forth as prototypes of what they now had in mind for class members. D.C. Opinion at C-19 - C-20, C-23 - C-24, C-26 - C-27, C-34 - C-35, C-37, C-81 - C-84 ("most of these facilities fail, in important respects, to provide class members with the most basic services mandated by the Consent Judgment").

With regard to respondents' motion to modify the definition of community placement and related provisions of the Consent Judgment,* the District

---

* Respondents also sought modification of provisions allowing them until April 30, 1981, to reduce Willowbrook to a facility of 250 beds or less and imposing associated planning requirements, Consent Judgment, Section V(1) at D-5, as well as relief from the three to six-bed limitation for the 100-plus class members covered by the Flower order. The District Court amended the latter order to permit placement of the Flower clients into community facilities of four to six beds. D.C. Opinion at C-115, C-116.

Court did extend the period in which community placement could be effected but declined to obliterate the requirement of community placement. Id. at C-95 - C-96, C-116.

The District Court based its denial of further community placement modifications on two separate and independent factual grounds, only one of which implicated questions of professional or clinical judgment regarding appropriate habilitation of mentally retarded individuals. First, the trial court found, on the basis of expert testimony, that facility size was an important factor in the effectiveness of community programs.

The second leg of the trial court's reasoning involved no weighing of clinical or medical judgments, but was based solely on observable, objectively measurable facts demonstrating that respondents' asserted difficulties in

making community placements under the agreed-upon definition were either exaggerated or caused by their own actions or failures to act. Id. at C-96 - C-107. Thus, for example, respondents argued they could not find sufficient small homes into which they could place residents. The District Court found, based on respondent's deposition testimony, that, at most, it was difficult to find sites for a small number of class members in only two Boroughs (Manhattan and Bronx). The court further found that respondents had exacerbated the housing problems by their own practices, including reducing the number of people looking for sites and the type of site being sought. The District Court thus declined to alter its fundamental community placement requirements until respondents had

made a reasonable effort to comply with them. Id. at C-103, C-106.

The Court Of Appeals' Decision

The Court of Appeals' decision of March 31, 1983, while generally affirming the trial judge's findings of noncompliance, reversed and remanded for further proceedings on respondents' motion to modify. Though not holding any of the District Court's findings to be clearly erroneous, Fed. R. Civ. P. 52(a), the Court of Appeals, in its discussion of the modification motion, nevertheless adopted respondents' view of the above factual issues, both clinical and non-clinical, holding that this Court's decision in Youngberg v. Romeo, supra, required unquestioning acceptance of all State opinions. C.A. Opinion at A-34 - A-35. It also assumed that the

primary purpose of the Willowbrook litigation was simply to empty the institution, and relegated to secondary importance petitioners' vital concern that class members not be transferred to other, albeit smaller, versions of Willowbrook. Id. at A-29.

With this foundation of appellate fact-finding, the Court of Appeals concluded that the trial judge had applied an erroneous legal standard for modification of a final consent judgment under F. R. Civ. P. 60(b)(5). In evaluating respondents' motion to allow "community placements" of up to 50 beds, the trial court had applied the standard enunciated by this Court in United States v. Swift & Co., 286 U.S. 106 (1932), requiring "a clear showing of grievous wrong evoked by new and unforeseen conditions." Id. at 119; D.C. Opinion at C-107 - C-111. This standard, said the

Court of Appeals, was inappropriate for "institutional reform" cases such as Willowbrook; rather, it said, in such cases motions for modification should be granted with "especially great generosity." C.A. Opinion at A-30 - A-34. The new substantive standard for modification of judgments was not further articulated; rather, the Court of Appeals' opinion simply proceeded to apply its new, unstated test to evidence weighed in the light of the deference to professional judgment supposedly mandated by Youngberg v. Romeo, supra -- deference which, under its interpretation, was tantamount to surrender. C.A. Opinion at A-34 - A-35.

Petitioners now seek review of the Court of Appeals' abandonment of the 50-year-old Swift standard, its substitution therefor of an unclear standard of "especially great generosity," and its

reading of Youngberg as to usurp the fact-finding and remedial functions of the District Court.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS HAS PLACED ITSELF IN CONFLICT WITH CONTROLLING PRIOR PRECEDENTS

A. The Court Below Has Disregarded the Holding of This Court in United States v. Swift & Co. and Its Progeny.

The standard for modification of a final consent judgment at the behest of a defendant was set forth by this Court in United States v. Swift & Co., supra, an antitrust case settled by a consent decree between the Federal government and five major meatpacking companies. On review of a modification approved below, this Court held:

> There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or

> wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting. Life is never static, and the passing of a decade has brought changes. . . . The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.

Id. at 119 (emphasis supplied).

No lesser standard emerged from United States v. United Shoe Corp., 391 U.S. 244 (1968), in which -- contrary to the situation in Swift and in the instant case -- it was the original plaintiff, the Federal government, that was seeking a modification of a long-standing antitrust decree. When the decree had been obtained with a specific result in mind and where

"time and experience" had shown that the result was not forthcoming, this Court held in United Shoe that the prevailing plaintiff might be entitled to further relief by way of modification; but where "the defendants sought relief not to achieve the purposes of the provisions of the decree, but to escape their impact," modification would not be warranted. Id. at 249. In such a case, the strict standard of Swift remained unchanged:

> Swift teaches that a decree may be changed upon an appropriate showing and it holds that it may not be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved.

Id. at 248 (emphasis in original). See also Columbia Artists Management Inc. v. United States, 381 U.S. 348, 352 (1965) (opinion dissenting from summary disposition); Ackermann v. United States, 340

U.S. 193, 198 (1950) (party cannot be relieved from a judgment even where "hindsight seems to indicate to [it] that [its] decision was probably wrong"); Chrysler Corp. v. United States, 316 U.S. 556 (1942).

The Eighth Circuit, in 1969, aptly summarized the teachings of Swift and its progeny:

> We glean, from this, certain factors of importance: (1) that, where modification and amendment of an existing decree is under consideration, there are "limits of inquiry" for the decree court and for the reviewing court; (2) that the inquiry is "whether the changes are so important that dangers, once substantial, have become attenuated to a shadow"; (3) that the movants must be "suffering hardship so extreme and unexpected" as to be regarded as "victims of oppression"; and (4) that there must be "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions." Placed in other words, this means for us that modification is only cautiously to be granted; that the dangers which the decree was meant to foreclose must almost have disappeared; that hardship

> and oppression, extreme and unexpected, are significant; and that the movants' task is to provide close to an unanswerable case. To repeat: caution, substantial change, unforeseenness, oppressive hardship, and a clear showing are the requirements.

Humble Oil & Refining Co. v. American Oil Co., 405 F.2d 803, 813 (8th Cir.) (Blackmun, J.), cert. denied, 395 U.S. 905 (1969).*

The Court of Appeals sought to distinguish the Willowbrook case from these precedents on the theory that even though the modification here was sought by respondent-defendants, "it is not, as in Swift, in derogation of the

---

* See also Nelson v. Collins, 700 F.2d 145 (4th Cir. 1983); Roberts v. St. Regis Paper Co., 653 F.2d 166, 174 (5th Cir. 1981); Holiday Inns, Inc. v. Holiday Inn, 645 F.2d 239, 240 (4th Cir.), cert. denied 454 U.S. 1053 (1981); United States v. Work Wear Corp., 602 F.2d 110, 113 n.6 (6th Cir. 1979); Mayberry v. Maroney, 558 F.2d 1159, 1163 (3rd Cir. 1977).

primary objective of the decree, namely, to empty such a mammoth institution as Willowbrook." C.A. Opinion at A-29. As noted above, this reasoning is incorrect. But as the Court of Appeals' decision ultimately makes clear, the lower court was not truly seeking to harmonize the outcome here with the strict holding of Swift, but rather was setting an entirely new modification standard for use in mental retardation and other litigation. Because of certain scholarly articles which it read as advocating a much less stringent standard in "institutional reform" cases, C.A. Opinion at A-30, and because of the "change in law" said to result from Youngberg v. Romeo, id. at A-33,* the Court of Appeals held that

---

* The type of "precedential evolution" represented by Youngberg, without more, does not justify relief under F.R. Civ. P. 60(b) (5). Mayberry v. (Continued)

respondents' motion in this case should be tested by an open-ended measure which was never clearly defined but which somehow meant, in this case at least, that Youngberg, not Swift, should apply. Id. at A-33 - A-35.* But surely, an evidentiary presumption employed in liability determinations cannot also serve as a substantive standard for post-judgment proceedings and modifications. Such a shocking departure from precedent, with such fateful consequences for the judicial system, ought to be considered by this Court at the earliest possible occasion. Sup. Ct. R. 17.1(c).

(Continued)

Maroney, supra at 1164; cf. In re Master Key Antitrust Litigation, 76 F.R.D. 460, 465 (D. Conn. 1977), aff'd 580 F.2d 1045 (2nd Cir. 1978)

* The Court of Appeals' version of Youngberg, moreover, bore little resemblance to what this Court actually held (see infra).

B. The Court of Appeals Decision Will Lead to Unnecessary and Protracted Litigation.

The Court of Appeals held, as noted above, that defendants' motions to modify final consent judgments should be generously granted. Without further defining the standard for modification, the court then held, pursuant to its erroneous reading of Youngberg v. Romeo, that views expressed by state defendants and their witnesses must be uncritically accepted by the district courts. This unlikely combination of standards will inevitably require the district courts, in this and other cases, to grant every defense motion for modification which some "professional" is willing to support. Such a procedure improperly robs final judgments of dignity or validity. See Wallace Clark & Co., Inc. v. Acheson Industries, Inc., 532 F.2d 846, 849 (2d

Cir.), cert. denied, 425 U.S. 976 (1976).

If allowed to stand, the Court of Appeals decision will lead to an endless tide of relitigation of matters long thought to be settled, on the part of State officials who have not met their obligations and now find it easier to change their "judgments" instead. Although it seemingly applies to any final judgment, entered on consent or otherwise, C.A. Opinion at A-27, the Willowbrook holding will especially discourage settlement of complex and time-consuming cases, and will force plaintiffs to go to trial in all such matters.* Plaintiffs will have absolutely no incentive to enter meaningful

---

* Consent judgments have proved useful in resolving many complicated challenges to institutional practices and conditions.

negotiations toward a consent decree, because State officials will remain free to seek modification as though no order had ever been issued; conversely, the concessions often made by plaintiffs, such as waiving a formal adjudication of their rights or a finding that these rights have been violated, will no longer be responsible.

This Court, as the overseer of a heavily taxed Federal judiciary, cannot but realize that the Court of Appeals' importation of the Youngberg v. Romeo standard into every stage of litigation will call into question the validity of all final injunctive orders, entered in a wide range of cases -- past, present, or future.* The Willowbrook decision

---

* More recently, the Court of Appeals gave renewed evidence of its determination to break new ground in (Continued)

is an open invitation to public officials to seek relief from their own commitments

---

(Continued)

> dramatically facilitating modification of final consent judgments. In ruling on (and affirming) a routine District Court order enforcing a stipulation regarding discipline at a New York State juvenile institution, the Court of Appeals gratuitously invited State officials to seek modifications of the stipulation under the lenient Willowbrook standard:
>
> > . . . we affirm Judge Motley but without prejudice to [defendants'] moving for . . . modification in the district court. . . . In considering a motion for modification, the district court should be guided by our recent decision in New York State Association for Retarded Children, Inc. v. Carey, and take into account all of the circumstances relating to the appropriateness of continuing this court ordered stipulation.
>
> Pena v. New York State Division for Youth, No. 82-7876 (2nd Cir., May 25, 1983), slip op. at 6. Petitioners are aware of nothing in the recent decisions of this Court or any other legal development which explains the Circuit's apparent antipathy toward good faith agreements negotiated in cases involving the State.

or judicial commands, under a standard which gives no weight to past adjudications. The Court of Appeals' decision thus stands the law of modification on its head.

II.

THE DECISION OF THE COURT OF APPEALS DEPARTS FROM THE USUAL AND ACCEPTED COURSE OF JUDICIAL PROCEEDINGS BY IMPROPERLY RESTRICTING THE POWER AND AUTHORITY OF THE DISTRICT COURTS.

The Court of Appeals focused upon that portion of Youngberg which defines the district courts' scope of inquiry in determining the initial liability of State officials:*

---

* It goes without saying that if the Court of Appeals were correct that Youngberg v. Romeo nonetheless applied to part or all of this case, it should not have attempted to apply that test to the record of a 25-day trial, C.A. Opinion at A-8, but

(continued)

> In determining what is "reasonable" -- in this and in any case presenting a claim for training by a state -- we emphasize that courts must show deference to the judgment exercised by a qualified professional . . . the decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice or standard as to demonstrate that the person responsible actually did not base the decision on such a judgment.

73 L.Ed. 2d at 41-42. It then adopted this cautionary language as the standard for defendant-initiated modifications in this and perhaps other types of litigation.

(continued)

> should have remanded such a complex matter for introduction of evidence addressed to the new legal standard and for plenary reconsideration by the court most familiar with the facts and background of the case. E.g., Daniel v. Goliday, 398 U.S. 73 (1970) (effect of subsequent decisional law "should be determined in the first instance by the District Court on a record developed by the parties with specific attention to the issue").

Moreover, as Youngberg was applied to the Willowbrook modifications, by the Court of Appeals decision, there was little for the District Court to do but endorse the views of respondents and their experts, both as to how the Consent Judgment ought to be interpreted and how its community placement provisions ought to be modified. C.A. Opinion, at A-18 - A-20, A-33 - A-35. The court's focus on the testimony of only respondents' witnesses, its suggestion that bad faith need be shown in order to impugn this testimony, and the narrow scope of its remand to the District Court all suggest that the trial judge must inevitably accede to the views of respondents and their experts. C.A. Opinion at A-33 - A-35.

Petitioners submit that such a disposition ousts the District Court from its primary function of finding facts

and fashioning appropriate injunctive relief, and elevates Youngberg's initial deference to professional judgment into an all but irrebuttable presumption that the State is always right. We do not believe this Court so intended to establish State officials and their witnesses as the ultimate arbiters of constitutional values.

A. District Courts Must Remain Free To Determine Facts and Devise Appropriate Remedies.

Even if Youngberg v. Romeo is the standard to be applied to respondents' motion for modification, petitioners cannot agree that this Court's ruling was intended to deprive district courts in this and other cases of their functions to weigh testimony and evidence, assess the credibility of witnesses, and determine the facts of a case in fashioning remedies. The Youngberg decision, after

all, creates only a presumption in favor of State officials' professional views, and then in their specific areas of competence. The facts bearing on remedy (or modification thereof) must still be found by the trial judge, not dictated by respondents and their experts.

And it is not, as the Court of Appeals seems to assume, a matter of counting the number of professionals who testified for the State and noting the absence of allegations of bad faith. C.A. Opinion at A-23 - A-24, A-34. To begin with, as an examination of the voluminous trial record will indicate, the views of both petitioners' and respondents' witnesses were considerably more complex than rigid insistence on ten and 50-bed limits respectively, See D.C. Opinion at C-66 - C-78. Their testimony needs to be carefully weighed by the

District Court*, and reconciled with other evidence to the extent possible, in order to determine what is an accepted professional judgment -- if that is to be the standard.

Moreover, expert testimony on behalf of State officials or anyone else ought still be subject to judicial scrutiny and to being disbelieved or discounted in appropriate instances. In this case, the District Court should be free to weigh the qualifications of respondents' experts (e.g., the fact that Dr. Shervert Frazier had had virtually no

---

* As the Tenth Circuit has held, citing Youngberg v. Romeo, what is required in these cases, even at the liability stage, is "a balancing process" between the asserted needs and interests of the institution and its residents. Milonas v. Williams, 691 F.2d 931, 942 (10th Cir. 1982), cert. denied 103 S. Ct. 1524 (1983). Such balancing is a proper function of the trial judge under normal fact-finding procedures.

experience with retarded people, T. 4755-4778, 5747-5748); their motives in testifying as they did (e.g., Barbara Blum had placed her own child in the 50-bed facility she described, T. 4050, 4102, and might have been less than objective in evaluating its suitability); their reliability (e.g., Dr. Philip Ziring assessed the medical needs of the Flower Hospital clients despite an admitted lack of familiarity with them, T. 2490, and in the face of petitioners' direct observational and documentary evidence which proved him wrong, D.C. Opinion at C-88, C-112 - C-113); and, of course, the witnesses' demeanor and their performance on cross-examination. Moreover, State officials' judgments which are found to be qualified by budgetary pressures, organizational loyalties, and personal career perspectives ought not to be entitled to

the respect which Youngberg accords the "untrammeled" clinical determinations of on-the-scene professionals. Society for Good Will to Retarded Children v. Carey, No. 78-Civ.-1847 (E.D.N.Y., February 24, 1983), slip op. at 4-5.

Whether or not the Court of Appeals considered that the District Court made these types of credibility judgments in reaching its decision, the narrowness of its remand seems to rule them out in future proceedings in this and other cases. Such a directive is not only an affront to the respected and experienced District Judge who has grappled with this difficult case for seven years, but it also diminishes and demeans the role of all district courts in cases where Youngberg is held to apply. This Court must therefore intervene to correct this unwarranted

departure from the accepted and usual course of judicial proceedings. Sup. Ct. R. 17.1(a).

B. Deference to Professional Judgment Must Be Limited to Areas of Clinical Expertise.

It is one thing to say, as this Court has in Youngberg, supra, 73 L. Ed. 2d at 41-42, that trial courts should defer to specific medical and clinical decisions made by State officials. It is quite another thing, which this Court has never done, to require district courts to accept any assertion made by such officials and their experts whether or not it is an exercise of medical or clinical judgment.

As noted above, the District Court's decision to grant only limited relief on respondents' motion to modify rested on two separate legs. Only the first, relating to the effect of size on the benefits of community placement, is

even arguably subject to Youngberg's professional judgment standard. The second, equally supportive, leg of the trial court's reasoning -- relating to the actual difficulty of locating small community sites and respondents' contributions to their own problems -- involves simple matters of fact to which the Youngberg standard has no possible application. There is no element of clinical or medical judgment involved in factually determining the state of the housing market, categorizing the ways in which the State arbitrarily and admittedly limited the pool of available residential sites, assessing the impact of so-called "community opposition," and objectively noting respondents' obvious failure to seek out all possible sources of funds for community programs. D.C. Opinion at C-96 - C-107. The Court of Appeals decision improperly treats all such

factual questions as matters of clinical or medical opinion into which the District Court should not intrude, when in fact they are complicated but traditional matters of fact which district courts routinely decide.

The ruling below also wholly ignores the possibility that a professional judgment, otherwise valid, may not be entitled to judicial deference if it is shown to be based upon an erroneous factual predicate. Respondents' experts may have said that in view of the unavailability of suitable small facilities, the prevalence of community opposition, and the medical needs of some clients, placement of Willowbrook class members in 50-bed residences was an appropriate professional choice. But if the evidence in the record convinced the trial court, as it did, that small facilities were not necessarily unavailable, D.C. Opinion at

C-96 - C-107, that community opposition was not a significant problem, D.C. Opinion at C-94 - C-95, and that the severe medical needs, upon factual examination, did not actually exist, D.C. Opinion at C-86 - C90, then the presumption which might otherwise be accorded these professional judgments ought no longer to apply.

Surely, objectively ascertainable facts such as those described above cannot be swept up in the rubric of "professional judgment," to which trial courts are bound to defer; if such deference is not confined to the type of clinical matters that this Court plainly intended, then district courts will be reduced to mere figureheads while State officials dictate what the Constitution will allow. Petitioners do not believe this Court can countenance such a misinterpretation of its holding in Youngberg.

CONCLUSION

The Court of Appeals' decision in this case drastically conflicts with 50 years of jurisprudence since this Court's ruling in United States v. Swift & Co., supra, and it misapplies this Court's holding in Youngberg v. Romeo, supra, so as to make it an "instrument of wrong" (in the words of Swift, at 115) and a distortion of the judicial process. Petitioners therefore ask this Court to grant a writ of certiorari in

order to decide the important questions presented by the decision below.

Dated: New York, New York
August 4, 1983

Respectfully submitted,

ARCHIBALD R. MURRAY
KALMAN FINKEL
JOHN E. KIRKLIN
RICHARD F. BRAUN
HELEN HERSHKOFF
Legal Aid Society
11 Park Place
New York, New York
10007
(212) 227-2755

Of Counsel:

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
By: Jonathan D.
Siegfried
Elisa M. Rivlin
345 Park Avenue
New York, New York
10154
(212) 644-8277

CHRISTOPHER A. HANSEN
(Counsel of Record)
ROBERT M. LEVY
New York Civil Liberties
Union
84 Fifth Avenue
New York, New York 10011
(212) 924-7800

MICHAEL S. LOTTMAN
MURRAY B. SCHNEPS
299 Broadway
Suite 805
New York, New York 10007
(212) 267-0760

WALTER C. REDFIELD
1290 Avenue of the Americas
Suite 4150
New York, New York 10104
(212) 977-9500

No. 83-213

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN, INC., et al.,

—and—

PATRICIA PARISI, et al.,

Petitioners,

—v.—

HUGH L. CAREY, individually and as Governor of the State of New York, et al.,

Respondents.

UNITED STATES OF AMERICA,

Amicus Curiae

APPENDIX TO PETITION FOR A WRIT OF *CERTIORARI* TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

ARCHIBALD R. MURRAY
KALMAN FINKEL
JOHN E. KIRKLIN
RICHARD F. BRAUN
HELEN HERSHKOFF
Legal Aid Society
11 Park Place
New York, New York 10007
(212) 227-2755

Of Counsel:
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
By: Jonathan D. Siegfried
Elisa M. Rivlin
345 Park Avenue
New York, New York 10154
(212) 644-8277

CHRISTOPHER A. HANSEN
(*Counsel of Record*)
ROBERT M. LEVY
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011
(212) 924-7800

MICHAEL S. LOTTMAN
MURRAY B. SCHNEPS
299 Broadway
Suite 805
New York, New York 10007
(212) 267-0760

WALTER C. REDFIELD
1290 Avenue of the Americas
Suite 4150
New York, New York 10104
(212) 977-9500

TABLE OF CONTENTS

[CORRECTED COPY]

APPENDIX A

Opinion of the Court
of Appeals, March 31, 1983

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 305, 821—August Term, 1982

(Argued December 16, 1982 Decided March 31, 1983)

Docket Nos. 82-7441, 82-7591

NEW YORK STATE ASSOCIATION FOR
RETARDED CHILDREN, INC., et al.

—and—

PATRICIA PARISI, et al.,

Plaintiffs-Appellees,

—v.—

HUGH L. CAREY, individually and as
Governor of the State of New York, et al.,

Defendants-Appellants.

UNITED STATES OF AMERICA,

Amicus Curiae.

Before:

FRIENDLY and NEWMAN, *Circuit Judges*,
and WYZANSKI, *District Judge.**

Appeal by the Governor of the State of New York and officials of its Office of Mental Retardation and Developmental Disabilities from orders of the District Court for the Eastern District of New York, John R. Bartels, Judge, entered on April 28 and July 13, 1982. The orders found appellants not to be in compliance with a Consent Judgment entered on April 30, 1975, between appellants and a class consisting of residents of Willowbrook State School, granted modification of the Consent Judgment more limited than appellants had sought, and appointed a Special Master to oversee compliance with the Consent Judgment. Affirmed in part and reversed and remanded in part.

CHRISTOPHER A. HANSEN, New York, NY, New York Civil Liberties Union, New York, NY (Robert M. Levy, Diana T. Tanaka), Legal Aid Society, New York, NY (Archibald R. Murray, Kalman Finkel), Paul, Weiss, Rifkind, Wharton & Garrison, New York, NY (Jonathan D. Siegfried, Helen Hershkoff, Elisa M. Rivlin), Michael S. Lottman, Murray B.

* United States District Court for the District of Massachusetts, sitting by designation.

Schneps, New York, NY, *for Plaintiffs-Appellees other than New York State Association for Retarded Children, Inc.*

WALTER REDFIELD, New York, NY, *for Plaintiff New York State Association for Retarded Children, Inc.*

TAYLOR R. BRIGGS, New York, NY, LeBoeuf, Lamb, Leiby & MacRae, New York, NY (Richard C. Cole, Kim Hoyt Sperduto, Joy Feigenbaum, Lawrence W. Pollack), Robert Abrams, New York State Attorney General (Frederick K. Mehlman, Assistant Attorney General), *for Defendants-Appellants.*

EDWARD R. KORMAN, United States Attorney for the Eastern District of New York, Wm. Bradford Reynolds, Assistant Attorney General, J. Harvie Wilkinson, Deputy Assistant Attorney General, Brian K. Landsberg, Louise A. Lerner, Attorneys, Department of Justice, Washington, D.C., *for Amicus Curiae United States.*

FRIENDLY, *Circuit Judge*:

The present appeal and a companion case, Docket No. 82-7531, are the latest in a long series of decisions[1]

---

[1] Previous reported decisions include *New York State Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y.

spawned by a complaint filed on March 17, 1972, by the New York State Association for Retarded Children, Inc. (NYSARC), other voluntary organizations, and individual mentally retarded persons on behalf of a class of mentally retarded children and adults residing at what was then Willowbrook State School for the Mentally Retarded and is now Staten Island Developmental Center (Willowbrook), alleging that inhuman conditions there violated constitutional rights protected by 42 U.S.C. § 1983. We provide here only so much background as is necessary to our decision.

I. FACTUAL BACKGROUND

At the commencement of the action, the resident population of Willowbrook was 5,700, or 65% over its official capacity, reduced from a peak of 6,200 in 1969, and the facility's overcrowding, understaffing, and physical squalor amounted to what one state defendant admitted was a "major tragedy", *NYSARC v. Carey,* 596 F.2d 27, 29-30 (2 Cir.), *cert. denied,* 444 U.S. 836 (1979). On April 10, 1973, after five days of hearings and a personal inspection of Willowbrook, the late Judge Orrin G. Judd held that state officials had violated plaintiffs' constitutional right to protection from harm in a state institution, 357 F. Supp. 752, 764-65, and granted preliminary relief ordering immediate hiring of additional staff and im-

---

1973); *New York State Ass'n for Retarded Children, Inc. v. Carey,* 393 F. Supp. 715 (E.D.N.Y. 1975); 409 F. Supp. 606 (E.D.N.Y. 1976); 438 F. Supp. 440 (E.D.N.Y. 1977); 456 F. Supp. 85 (E.D.N.Y. 1978); 466 F. Supp. 479 (E.D.N.Y. 1978), *aff'd,* 612 F.2d 644 (2 Cir. 1979); 466 F. Supp. 487 (E.D.N.Y. 1979); 596 F.2d 27 (2 Cir.), *cert. denied,* 444 U.S. 836 (1979); 492 F. Supp. 1099 (E.D.N.Y. 1980); 492 F. Supp. 1110 (E.D.N.Y.), *rev'd,* 631 F.2d 162 (2 Cir. 1980); 544 F. Supp. 330 (E.D.N.Y. 1982).

provement of conditions to attain minimal standards of health and safety, *id.* at 768-69. Subsequently plaintiffs, joined by the United States Department of Justice as amicus curiae, moved to have several state officials held in contempt. Settlement negotiations were pursued during a trial on the issue of noncompliance in late 1974 and were resumed in 1975 under a new state administration. These led to the Consent Judgment of April 30, 1975, which Judge Judd approved, 393 F. Supp. 715.

The 1975 Consent Judgment, reproduced at 1 Mental Disability L. Rep. 58 (1976), specified "steps, standards and procedures necessary to secure the constitutional right to protection from harm" for members of plaintiff class, including reduction of Willowbrook's resident population to 250, all remaining residents to be from Staten Island homes,[2] by April 30, 1981. It ordered and enjoined state officials, "[w]ithin their lawful authority" and "subject to any legislative approval that may be required" to "take all actions necessary to secure implementation of" the detailed "steps, standards and procedures" incorporated in a lengthy appendix to the Consent Judgment and to "ensure the full and timely financing of this judgment". Consent Judgment at 3-4. The court created a Review Panel to monitor implementation of the Consent Judgment, as well as a Professional Advisory Board and a Consumer Advisory Board to assist the Review Panel and state administrators. *Id.* at 5-11. The court retained jurisdiction to entertain applications for orders constru-

---

[2] This requirement has been elaborated by the Office of Mental Retardation and Developmental Disabilities (OMRDD) into a self-imposed "County of Origin" Policy by which each class member is placed in the borough or county from which he or she was originally committed to Willowbrook.

ing, implementing, or enforcing compliance with the provisions of the Consent Judgment. *Id.* at 11-12.

The Consent Judgment ordered that the plaintiff class be provided with "the least restrictive and most normal living conditions possible". Consent Judgment, Appendix A at 1. Included among the requirements implementing this standard were provisions for "clean, adequate and seasonally appropriate clothing", "accessible, private and easily usable toilets and bathing facilities", and "clean, odorless, and insect-free" living quarters. *Id.* at 1-2. Residents were to receive individualized care, opportunities for education and recreation, and adequate medical services. *Id.* at 5-16. Restrictions were placed on use of physical restraints, experimentation on residents, and exaction of residents' labor for the upkeep of the institution. *Id.* at 17-19.

Reduction of Willowbrook's population from 5700 to 250 was to be achieved by relocation of its residents to "community placements" designed "to ready each resident, with due regard for his or her own disabilities and with full appreciation for his or her own capabilities for development, for life in the community at large." *Id.* at 28. A "community placement" was defined in the Consent Judgment as

> a non-institutional residence in the community in a hostel, halfway house, group home, foster care home, or similarly residential facility of fifteen or fewer beds for mildly retarded adults, and ten or fewer beds for all others, coupled with a program element adequate to meet the resident's individual needs.

Id. at 27. This restriction placed on the size of community placements, which we shall call for simplicity's sake the

"15 bed/10 bed limitation", would contribute to the "normalization" of the lives of plaintiff class members by approximating as nearly as possible the housing situations of non-retarded children and adults.

The road to compliance has not been easy and has by no means reached its end.[3] A prior opinion of this court, 596 F.2d 27, 31-36 (2 Cir. 1979), gives a detailed account of the elaborate enforcement mechanisms set up by the district court. From 1975 to 1980, the Willowbrook Review Panel issued periodic audit reports on the degree of compliance with the Consent Judgment and some 25 formal recommendations for the closing of certain facilities, hiring of medical and psychiatric personnel, provision of educational programming, and similar matters. Judge Bartels, succeeding Judge Judd in the case, embodied many of these recommendations in orders to the defendants and conducted hearings on plaintiffs' motions of November 11, 1976, and September 9, 1978, for findings of civil contempt against state officials.

In one such enforcement proceeding, the Willowbrook Review Panel recommended on May 24, 1979, that in order to comply with the Consent Judgment, the defendants should provide a group of multiply handicapped class members transferred to Flower Fifth Avenue Hospital (Flower Hospital) with "community placements" of no more than three beds each. Defendants refused to implement the recommendation unless a court order compelled them to do so. After an evidentiary hearing, "the parties having agreed in open court on September 11,

---

[3] One rough measure of the time and energy devoted thus far by the parties and the district court to the enforcement of the Consent Judgment is the district court's docket sheet. Twelve pages of closely typed entries precede the notation of final judgment in 1975; 39 pages follow it.

1979, to a resolution of said issue," the court ordered that the Flower Hospital group be placed in residential facilities of six beds or less, with the more severely disabled half of this group placed in facilities of three beds or less (the "6 bed/3 bed limitation").

The Willowbrook Review Panel has effectively ceased to monitor compliance with the Consent Judgment since the state legislature in March, 1980, refused to appropriate funds necessary to continue its operations. This court subsequently held that the district court could not compel the Governor of New York and its comptroller to reinstate funding for the Review Panel in defiance of the legislature and of state law, 631 F.2d 162, 166 (2 Cir. 1980). With the demise of the Review Panel, counsel for the plaintiff class brought charges of noncompliance directly to the district court's attention. As of August 31, 1981, 1369 members of the original class remained at Willowbrook awaiting placement and 999 had been transferred temporarily to other large institutions. Of the level of sanitation, resident care, and maintenance at Willowbrook revealed by audits in March and September, 1981, we shall have more to say hereafter.

Plaintiffs moved on May 22, 1981, for an order declaring that the defendants were not in compliance with provisions of the Consent Judgment relating to clothing, nutrition, environment, staffing, programs and services, and community placement, and for an order referring further issues of compliance with the Consent Judgment to a Special Master. On the same day, defendants moved pursuant to F.R.Civ.P 60(b) to modify the 15 bed/10 bed limitation in the Consent Judgment and the 6 bed/3 bed limitation in the Flower Hospital Order to a 50 bed limitation. After extensive discovery and 25 days of testimony, the district court on April 28, 1982, issued the decision prompting the present appeal.

Judge Bartels, while not doubting "the good faith of the defendants in attempting to comply with the Judgment", Opinion at 33, found that they had failed to attain its standards for sanitation, maintenance, clothing, programming, special therapies, recreation, nutrition, and staffing. He ordered defendants to comply in these respects "with all deliberate speed", but extended the deadline for finding community placements for plaintiffs to April 1, 1985, Opinion at 70. The decision further provided that a Special Master be appointed, in place of the defunct Review Panel, to monitor compliance with the Consent Judgment. Finally, Judge Bartels ordered modification of the Flower Hospital Order's 6 bed/3 bed limitation to a 6 bed/4 bed limitation, but denied defendants' motion to modify the 15 bed/10 bed limitation in the Consent Judgment. By order dated July 13, 1982, Judge Bartels named Dr. Rudy Magnone as Special Master and enumerated his duties and powers.

II. FINDINGS OF NONCOMPLIANCE

Defendants attack the district court's findings of noncompliance with the Consent Judgment on two grounds. First, they charge that the district court's findings were based on inadmissible evidence obtained pursuant to a discovery order so fundamentally unfair to defendants that it amounted to an abuse of the court's discretion. Second, they attack the findings themselves as "clearly erroneous". Neither ground warrants reversal of the district court's findings of noncompliance.[4]

---

[4] Appellants do not challenge this portion of the judgment on the basis of the Supreme Court's decision in *Youngberg v. Romeo*, 73 L.Ed. 2d 28, decided on June 18, 1982, subsequent to the district court's decision. We discuss the effect of *Youngberg* below.

The district court's order of July 7, 1981, made over defendants' objection,[5] permitted plaintiffs' counsel, consultants, and experts to inspect the Willowbrook facilities, "take photographs, make observations, take notes, form conclusions and interview any class member, staff member or employee desired outside the presence of defendants," their counsel and representatives.[6] Plaintiffs' representatives were instructed to minimize disruption of defendants' operation and to limit the number of observers on any one inspection to four. Defendants were instructed to allow their employees to answer all questions put to them by the visitors. Defendants now charge that as a result of this order, hearsay statements of unidentified Willowbrook staff members, unsubstantiated observations of plaintiffs' expert witnesses, and prejudicial photographs were admitted into evidence and were expressly relied upon in the district court opinion.[7]

In challenging the propriety of the discovery order, defendants rely principally on *Belcher v. Bassett Furni-*

---

5 At the hearing on plaintiffs' motion for the discovery order, defendants objected especially to plaintiffs' counsel questioning defendants' employees without defendants' counsel present. The circumstances here, however, are similar to those in *Vega v. Bloomsburgh*, 427 F. Supp. 593, 595 (D. Mass. 1977), wherein this practice was approved.

6 Plaintiffs pointed out at the hearing that similar discovery orders were granted by Judge Johnson in *Wyatt v. Hardin*, C/A No. 3195-N (M.D. Ala., June 21, 1978).

7 Defendants object particularly to a footnote in Judge Bartels' opinion, n. 10, mentioning that Dr. Clements observed in the lunchroom a class member sitting in a puddle of urine and testified to an out-of-court statement by an unnamed employee that it was not her job to clean up urine. Dr. Clements then saw the class member drop his spoon into the puddle, retrieve it, and continue to eat. It is clear, however, that Judge Bartels relied not upon the truth of the hearsay statement but upon Dr. Clements' observation that while he was in the lunchroom the employee noticed the situation and did nothing to remedy it.

ture Industries, Inc., 588 F.2d 904 (4 Cir. 1978), an employment discrimination case in which an order permitting inspection of defendant's plant and questioning of its employees by the plaintiff's expert was reversed. That decision correctly states the standard to be used in deciding whether, under F.R.Civ.P. 26(c), a discovery order such as this one is unduly burdensome: "Under this subsection, the degree to which the proposed inspection will aid in the search for truth must be balanced against the burdens and dangers created by the inspection." 588 F.2d at 908. The danger, there as here, was that "interrogation of the employees, conducted informally" could amount to "a roving deposition, taken without notice, throughout the plants, of persons who were not sworn and whose testimony was not recorded, and without any right by the defendant to make any objection to the questions asked. Presumably, on the basis of such interrogations, the expert would base his testimony." *Id.* at 907. The Fourth Circuit found that this danger, combined with the burden of disruption of defendant's operations, outweighed the speculative gains to be derived, in light of the facts that the complaint in *Belcher* had alleged no specific instances of discrimination, the motion for the discovery order mentioned no specific areas of inquiry, and the expert witness's special field of expertise was not described.

A different balance must be struck in the present case. Here plaintiff counsel's claims of noncompliance were quite specific and their inspections were meant to fill a gap left by the demise of the Review Panel provided for in the Consent Judgment. Judge Bartels, calling on his years of experience with the case, was well able to determine the value this form of discovery would have in resolving the controversy then before him. In many re-

spects the inspection procedure here resembles the placement of experts within Texas Youth Council facilities permitted in *Morales v. Turman*, 59 F.R.D. 157, 159 (E.D. Tex. 1972). Mindful of the unique difficulties presented in post-judgment compliance efforts of the sort here in question, we do not consider the district court's discovery order of July 7, 1981, to have been an abuse of discretion. Almost all the out-of-court statements by unnamed Willowbrook employees provisionally admitted were received for the purpose of enabling plaintiffs' experts to express an opinion as permitted by F.R.E. 703. Moreover, the eyewitness observations to which plaintiffs' experts testified and the documentary and photographic exhibits afforded ample basis for the district court's findings.

Defendants further attempt to show that the findings of noncompliance in Judge Bartels' Opinion and Order of April 28, 1982, (Opinion) were clearly erroneous. They do this in the face of a Compliance Report (Report) prepared by defendant officials of OMRDD in March 1981 admitting noncompliance with 137 of 385 standards embodying the mandates of the Consent Judgment. Report at 15. Details of these findings and defendants' charges of error follow.

Judge Bartels found that "sanitation at Willowbrook is totally unsatisfactory and presents a serious health hazard to the resident population." Opinion at 10. Rodents and cockroaches infest the kitchens and dining rooms. Human feces and urine pollute bathrooms and living areas. The district judge also found that "[t]he most glaring maintenance inadequacies," included blocked plumbing, broken furniture, and lack of curtains for privacy, "stem from present, not past neglect." Opinion at 13. Defendants argue that the judge should have ignored testimony

of Willowbrook Review Panel chairman Dr. James Clements and plaintiffs' photographic evidence in favor of his own observations during a tour of Willowbrook on the first day of trial. We find no error in the district court's reliance on the repeated visists of Dr. Clements. Defendants' own Compliance Report revealed noncompliance with 22 of 39 applicable standards in this area, including those specifying absence of "offensive, irritating odors" and of food, dirt, and trash of more than one day's accumulation. Report at 41-42.

Judge Bartels found that "[s]ome residents at Willowbrook are partially clothed, others go nude, and many wear clothes that are ill-fitting, badly torn and stained." Opinion at 15. The court noted that toilet training of class members cannot proceed when they are pinned or tied into their clothing and thus cannot remove it themselves. Defendants point to testimony describing improvements in this area but, despite these hopeful signs, their Compliance Report records that the clothing supply is insufficient and that clothes are frequently ill-fitting and in disrepair. Report at 10.

Delivery of programming, that is, formal training or instruction for the mentally retarded person's individual needs, was found seriously deficient. Some residents, due to lack of transportation or lack of clothing, never arrive at their programming sessions. Even for those residents who attend, the court found, "[d]efendants have been remiss in developing and implementing individual development treatment plans." Opinion at 19. Here conflicting expert testimony permitted the court to conclude, in accordance with defendants' Compliance Report, that "[m]any recommended programs and services . . . were not being implemented"; residents instead "were observed sitting inactively in program areas." Report at 6.

Defendants on appeal do not mention the court's findings on the absence and misuse of equipment for residents requiring special therapies, enforced idleness due to lack of any recreation equipment, and failure to provide special diets for residents who need them. Opinion at 20-22. Defendants do, however, contest vigorously Judge Bartels' finding of "serious staff shortages" due to chronic tardiness, absences, and inefficient deployment of what would otherwise be adequate numbers of employees. Opinion at 23-24. Defendants insist that the court improperly relied upon plaintiffs' figures based on worksheets that did not provide complete records of staff attendance. Yet defendants' February 1981 Compliance Report on staffing (Staff Report) revealed the same conclusions. Full compliance could be shown among direct staff, at least on weekdays, when all buildings and shifts were averaged, but "the range of surpluses and deficits varied considerably among buildings." Staff Report at 2. Among mid-level supervisors, even the average attendance in all buildings of the Willowbrook facility during all shifts, including paydays, did not amount to full compliance. Staff Report at 3. Neither this nor any of the findings previously mentioned constitutes the clear error that would be required for us to reverse the judge's findings on conditions at Willowbrook.

III. APPOINTMENT OF A SPECIAL MASTER

Defendants seek to have the district court's appointment of a special master set aside as an abuse of discretion. Their argument that the present case fails to show the requisite "exceptional condition" under F.R.Civ.P. 53(b) is wholly lacking in merit. The monitoring of a Consent Judgment that mandates individualized care for

thousands of class members and that entails balancing of the interests of parties with third-party employees,[8] school authorities,[9] and community groups[10] is just the sort of "polycentric problem that cannot easily be resolved through a traditional courtroom-bound adjudicative process" for which Judge Weinstein found a Special Master appropriate in *Hart v. Community School Bd. of Brooklyn*, 383 F. Supp. 699, 766 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2 Cir. 1975). See also *Gary W. v. Louisiana*, 601 F.2d 240, 244-45 (5 Cir. 1979); *Halderman v. Pennhurst State School & Hospital*, 612 F.2d 84, 111 (3 Cir. 1979)[11] and cases cited in these opinions.

---

8 See *NYSARC v. Carey*, 438 F. Supp. 440 (E.D.N.Y. 1977) (joining the Civil Service Employees Association, Inc. for an ancillary proceeding determining whether a proposed contract between the Department of Mental Hygiene and United Cerebral Palsy "would infringe on any rights of the employees at Willowbrook"); 456 F. Supp. 85 (E.D.N.Y. 1978) (concluding the ancillary proceeding).

9 See *NYSARC v. Carey*, 466 F. Supp. 479 (E.D.N.Y. 1978) (enjoining city board of education from excluding mentally retarded children from regular school classes because they carried serum hepatitis), *aff'd*, 612 F.2d 644 (2 Cir. 1979).

10 See, e.g., *People of the State of New York v. 11 Cornwell Co.*, slip ops. at 5569 (2 Cir., Nov. 30, 1982) (state suit on behalf of its mentally retarded citizens against partnership formed by neighbors seeking to prevent OMRDD from purchasing house as community residence for the retarded).

11 We are mindful of Justice White's disapproval of use of a Special Master in the *Pennhurst* proceeding "to decide which of the Pennhurst inmates should remain and which should be moved to community-based facilities", *Pennhurst State School v. Halderman*, 451 U.S. 1, 54 (1981) (White, J., dissenting in part). A decision presenting that issue is now before the Supreme Court, *Halderman v. Pennhurst State School & Hospital*, 673 F.2d 647 (3 Cir.) (en banc) (reinstating judgment on state law grounds), *cert. granted*, 102 S. Ct. 2956 (1982). The Special Master in this case has power to monitor and to make recommendations concerning placement of individuals, but is not given power to decide.

Underlying defendants' objection to the appointment is the apprehension that the Special Master would become Willowbrook's *de facto* administrator, intervening at every decision-making stage and rewarding the exposure of deficiencies in ways that would be disastrous to staff morale. An order appointing a special master to oversee a city's compliance with the Fair Housing Act, a remedy opposed by defendants and plaintiffs, was reversed in *United States v. City of Parma*, 661 F.2d 562, 579 (6 Cir. 1981), *cert. denied*, 102 S. Ct. 1972 (1982), on the ground of intrusiveness. The limited powers of this Special Master, as set forth in Judge Bartels' Order of July 13, 1982, assure that this spectre of usurpation is unlikely to materialize.

Provisions of the July 13, 1982, Order allowing the Master access to Willowbrook records and buildings, permitting him to interview class members and defendants' employees, requiring his staff to compile periodic reports on compliance, and permitting inspection and copying of such reports by all parties, Order at 3-4, are taken practically word-for-word from the powers and duties of the Review Panel set forth in the 1975 Consent Judgment at 7, as is the provision punishing as contempt of court any interference with the Special Master or his staff by any person with notice of the Order. The Order also reproduces the mechanism by which the Review Panel made recommendations regarding compliance with or interpretation of the Consent Judgment, which became binding on all parties unless written objections are filed seeking resolution by the court. Order at 4-5; Consent Judgment at 9. As this court stated in an earlier opinion dealing with Willowbrook, "the parties knowingly and intentionally delegated to a panel of chosen experts the power to make the initial determination on important

matters involving the meaning and interpretation of the Consent Judgment", 596 F.2d at 32-33. "[T]hey created continually evolving enforcement and supervisory mechanisms" thought necessary to "meet evolving conditions and to resolve differences", *id.* at 37. The powers of the Special Master to inspect, to interview, and to make recommendations go no further than those agreed to in the Consent Judgment.

Other powers and duties of the Special Master are more narrowly circumscribed than those previously possessed by the Review Panel. The Special Master is directed to review, integrate, and harmonize the audits conducted by the many existing monitoring groups, Order at 3, and may require the defendants to submit "any reports necessary to assist the Master in performing his duties", Order at 4, but he and his staff do not have the Review Panel's blanket power to "conduct any additional inquiries they deem necessary or appropriate." Consent Judgment at 8. The Order contemplates a role for the Special Master at once less formal and more facilitative than that of the former Review Panel. While the Consent Judgment placed little emphasis on the Review Panel's power to make "informal suggestions", Consent Judgment at 8, the Order in several of its provisions directs the Special Master to provide assistance and advice to the parties, report to the parties, consult with the parties informally, and conduct informal working sessions. Order at 4-5, 7. Correspondingly, "[d]efendants and all of their agents, as well as public agencies of the State of New York, are directed to cooperate fully with the Master in order to accomplish the purposes of this order". *Id.* at 8. The following provision of the Order had no counterpart in the Consent Judgment:

> The Master shall have no authority to exercise any control or management over the operation of any facility operated or licensed by the State of New York, but he shall have authority to monitor the location and acquisition of community placement facilities in order to meet the placement goals of the Consent Judgment, and to make a report to the parties with respect thereto.

The powers granted to the Special Master here comport with those granted in similar cases by other courts. See *Gary W., supra,* 601 F.2d at 245 and cases cited therein. As limited by the letter and spirit of Judge Bartels' Order of July 13, 1982, the Special Master's role does not threaten usurpation of state functions.[12]

What we have said largely answers the appellants' arguments on this aspect of the case based on *Youngberg v. Romeo,* 73 L. Ed. 2d 28, decided by the Supreme Court on June 18, 1982, nearly two months after the decision here. That case, as it reached the Supreme Court on certiorari to the Third Circuit, 644 F.2d 147, was a suit for damages under 42 U.S.C. § 1983 against Pennsylvania state officials by a retarded man who, at his mother's

---

12 Defendants also contend that the provision of Judge Bartel's Order which taxes them with the necessary expenses for carrying out the Special Master's duties, Order at 6, violates principles of federalism. The appointment of a Special Master clearly was meant to fill the void left by the state legislature's refusal to fund the Willowbrook Review Panel, which the district court was powerless to undo. See *NYSARC v. Carey,* 631 F.2d 162 (2 Cir. 1980). This fact does not itself detract from the legitimacy of the district court's allocation of costs to defendants under F.R.Civ.P. 53(a). See *Gary W., supra,* 601 F.2d at 245-46; *Morgan v. Kerrigan,* 530 F.2d 401, 427 (1 Cir.), *cert. denied,* 426 F.2d 935 (1976). See also *Halderman v. Pennhurst State School & Hospital,* 526 F. Supp. 428 (E.D. Pa. 1981) (proceeds from contempt fines paid to special master). The federal court in awarding costs may treat the state "like any other litigant", *Hutto v. Finney,* 437 U.S. 678, 696 (1978).

request, had been committed to the Pennhurst State School and Hospital. The damages sought were for injuries received as a result of Romeo's own violence and the reactions of other residents to him, for unduly prolonged physical restraints, and for failure to provide Romeo with appropriate treatment for his mental retardation. The Court upheld Romeo's claims to safe conditions and to freedom from unnecessary bodily restraints. It found his claim to a "constitutional right to minimally adequate habilitation" to be "more troubling", 73 L. Ed. 2d at 37. Because of what it thought to be a disavowal of broader claims, 73 L. Ed. 2d at 38-39 & n.23, the Court considered that Romeo was asserting only a constitutional right to "minimally adequate or reasonable training to ensure safety and freedom from undue restraint." 73 L. Ed. 2d at 39. It sustained this claim and, because of the disavowal, found it unnecessary to consider "the difficult question whether a mentally retarded person, involuntarily committed to a state institution, has some general constitutional right to training per se, even when no type or amount of training would lead to freedom." *Id.* However, in what for us is the most important passage in the opinion, the Court endorsed the standard articulated by Chief Judge Seitz of the Third Circuit as that to be applied in reviewing state action for the protection of the involuntarily committed. This was that, 644 F.2d at 178:

> the Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.

Justice Powell went on to say, 73 L. Ed. 2d at 41-42:

> In determining what is "reasonable"—in this and in any case presenting a claim for training by a state—we emphasize that courts must show deference to the judgment exercised by a qualified professional. By so limiting judicial review of challenges to conditions in state institutions, interference by the federal judiciary with the internal operations of these institutions should be minimized. Moreover, there certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions. . . . For these reasons, the decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.

We are unable to agree with appellants that *Youngberg* automatically leads to reversal of what would otherwise have been an appropriate exercise of the judge's discretion to appoint a Special Master. What it does do is supply a standard that will be relevant to any further attempts that might be made to modify the terms of the consent decree, as we hold it to be with respect to this one. To the extent that the decree leaves room for interpretation, that standard will also have relevance for the Special Master in making recommendations and for the district court in ruling upon them. Time may show that because of *Youngberg*'s restrictive effect upon the scope of the review, the Special Master is unnecessary. In that event the defendants are free to move that the appointment be terminated.

IV. MODIFICATION OF THE CONSENT JUDGMENT

Although we have rejected the foregoing challenges to the action of the district court, we take a different view with respect to its refusal to modify the Consent Judgment's 15 bed/10 bed limitation on the size of community placement facilities for the Willowbrook class and to do more than slightly modify its Flower Hospital Order from a 6 bed/3 bed limitation to one of 6 bed/4 bed.

At the hearing before the district court, defendants made a strong showing that only by modifying the 15 bed/10 bed limitation to one of community placements up to 50 beds in size[13] could they expeditiously relocate the remaining 1369 residents of Willowbrook and the 999 class members temporarily residing in other large institutions. They presented testimony of state officials and expert witnesses that some class members would be better cared for and better adjusted in facilities of intermediate size. Defendants also showed that the 6 bed/3 bed limitation on placements for the multiply handicapped residents of Flower Hospital effectively denied those individuals the proper medical supervision they require.

In the first place, New York City's extremely tight housing market has slowed down OMRDD's placement of class members in community residences within their home boroughs. OMRDD's past and present directors of

---

[13] If modification were granted, OMRDD proposed to construct in fiscal year 1983:

18 community residences of 4-10 beds each;
15 residences of 11-24 beds each;
2 residences of 25-34 beds each; and
3 residences of 35-50 beds each.

Defendants' Post-Trial Memorandum at 85-86.

community placement testified to the difficulties encountered in finding residences of more than 3 or 4 beds in the city and the greatly increased costs per class member when residences of such small size are acquired and adapted for mentally retarded persons. To obtain community placements of 8 to 10 beds, OMRDD often must purchase vacant sites that could accomodate group homes above the 15 bed/10 bed limit at little additional cost.

Some of the placement difficulties encountered by defendants can be traced to the time-consuming procedures for dealing with neighborhood opposition, see note 9, *supra*, under New York Mental Hygiene Law § 41.34 (McKinney Supp. 1982-83). Another obstacle, defendants' "County of Origin" policy of relocating most Willowbrook residents in the boroughs in which their families still reside, represents a further attempt to defuse neighborhood opposition to "outsiders". Finally, OMRDD has had to rule out many 3 to 4 bed apartments because in order to qualify for federal Medicaid contributions, community facilities housing individuals incapable of responding to emergency situations must be adapted to meet the National Fire Protection Association Life Safety Code, 42 C.F.R. 442.507-442.508 (1981).

The district court took "judicial notice of the current housing shortage in New York City" as a temporary phenomenon but found that "this year 57 new community residences designed to accommodate approximately 450 persons will become available in the New York City area alone, and another 88 units, housing approximately 700 persons, are anticipated for fiscal year 1982-83", Opinion at 57-58. The court based its finding on testimony of OMRDD Special Assistant Cora Hoffman and Facilities Development Corporation employee Edward R. Matthews that some 80 sites were "in the pipeline" for the

coming year. In response to questioning by the court, however, Hoffman explained that sites "in the pipeline" had been located but had not been approved or acquired. "Some of them," she stated, probably more than half, "we won't ever get". This evidence did not warrant the district court's converting OMRDD's sanguine hopes into realizable facts.

Judge Bartels also found that delays and abandonment of placement sites due to compliance with the "County of Origin" policy, New York Mental Hygiene Law § 41.34, and the federal Life Safety Code were among the "self-imposed" obstacles making defendants' placement difficulties largely a problem of their own creation. By adopting this perspective, however, the district court lost sight of the interests of third parties and the complex environment in which OMRDD must operate. On a less narrow and adversarial view of the evidence, OMRDD's difficulties in stemming neighborhood resistance and securing federal funding take on a real and formidable aspect.

Next to be mentioned is the plethora of expert testimony on the size of the residential facility as a factor bearing on the care received by mentally retarded persons and their opportunities for development. Defendants produced OMRDD Acting Commissioner Sygmond Slezak, New York State Department of Social Services Commissioner Barbara Blum, former Willowbrook Director of Medical Services Dr. Philip Ziring, Associate Director of the Illinois Department of Developmental Disabilities Dr. Richard Blanton, Harvard Psychiatry Professor and former Texas Commissioner of Mental Retardation Dr. Shervert Frazier, Boston University Professor of Special Education Dr. Sue Allen Warren, and Marc Brandt of the Sullivan County Association for Retarded Children, all of

whom were in general agreement that a range of facilities of different sizes up to 50 beds would best serve the Willowbrook class. The quality of care and relationships between staff and residents, it was testified, would not suffer in facilities of larger size. Moreover, community placements of less than 10 beds, according to Dr. Ziring and Dr. Frazier, could not each be staffed with physicians and therapists necessary for disabled class members and those with special health risks. In particular, Dr. Ziring considered that the limited access to proper medical care that multiply handicapped residents of Flower Hospital would have in community placements of 3 to 6 beds would amount to "malpractice."

Against this testimony, plaintiffs' and amicus curiae's expert witnesses, including Massachusetts Assistant Commissioner for Mental Retardation Kathleen Schwaninger, Arizona Assistant Deputy Director Brian Lensink, Chairman of the Willowbrook Review Panel Dr. James Clements, University of Alabama Professor of Medicine Dr. Andrew Lorincz, and Gerald Provencal and Lyn Rucker, both of whom run small group homes in other states, joined in contending that the size of a residential facility is the single most important factor in the development of mentally retarded individuals. Facilities of 10 beds or less, these experts testified, provide consistency of programming and care as well as the warmth of personal relationships. Plaintiffs' medical experts concluded that the medical problems of Willowbrook class members were exaggerated by defendants' experts. Even the Flower Hospital residents, according to Dr. Lorincz, were medically stable and posed no risks that adequately trained staff could not handle.

The district court rejected the evidence of defendants' witnesses and remained convinced "that the needs of the

Willowbrook class members are better met in small group homes than in facilities ranging in size from 11 to 50 beds", Opinion at 47.[14] The court noted that defendants had agreed in 1975 to the 15 bed/10 bed limitation and thus would have to argue "either that professional knowledge has changed or that practical experience has shown that the quality of care is the same in facilities sized from 1 to 50 residents", Opinion at 47-48. In so holding, the district court allowed one provision of the Consent Judgment, that requiring 15 bed/10 bed community placements, to override the more comprehensive goal of transferring the population of Willowbrook, whose squalid living conditions this court has already recited, to facilities of more human dimension as quickly as possible.

An injunction, as a final judgment with prospective application, may be modified by the court upon motion by a party and a showing that continuation of the injunction would be inequitable. F.R.Civ.P. 60(b)(5) expressly authorizes a district court to relieve a party from a final judgment if "it is no longer equitable that the judgment should have prospective application." The power of a court of equity to modify a decree of injunctive relief is long-established, broad, and flexible. "A continuing decree of injunction directed to events to come

---

[14] One of the reasons given by the district court for rejecting defendants' expert testimony was defendants' failure to identify specific individuals within the Willowbrook class whose medical or developmental needs would be better served by placement in facilities of 11 to 50 beds, Opinion at 52 & n.27. With so many other problems pressing, defendants could not fairly be expected to devote time and resources to an assessment of the adaptability of several thousand individuals to facilities of a size defendants were yet barred from employing. The modification requested by defendants would not relieve them of the further duty imposed by the Consent Judgment to evaluate "the community alternative best suited for each resident".

is subject always to adaptation as events may shape the need. . . . The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative.", *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932) (Cardozo, J.). "Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted", *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 298 (1941) (Frankfurter, J.).

In denying defendants' motion for modification of the limitation on the size of community placement facilities, Judge Bartels relied on other language of Justice Cardozo in *United States v. Swift & Co.*, *supra*, 286 U.S. at 119, quoted here *in extenso*:

> There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting. Life is never static, and the passing of a decade has brought changes to the grocery business [the subject of the decree] as it has to every other. The inquiry for us is whether the changes are so important that the dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and

> unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.

This apparent hardening of the usual standard for modifying decrees of injunctive relief did not stem from the fact that in *Swift* the Court was dealing with a consent decree. Justice Cardozo explicitly ruled that "[t]he result is all one whether the decree has been entered after litigation or by consent" and rejected the argument that for purposes of modification by the court, "a decree entered upon consent is to be treated as a contract and not as a judicial act. . . . The consent is to be read as directed toward events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be", 286 U.S. at 114, 115.[15] Rather, the considerations underlying the language just quoted from *Swift* were based on the specific facts then before the Court.

The consent decree at issue in *Swift* had been entered into by the United States and five major meatpackers in February, 1920, enjoining the meatpackers from violating the antitrust laws and from holding any interest in several lines of business, including the wholesale and retail provision of other foodstuffs such as fish, vegetables, fruit and

---

[15] This position was reaffirmed in *System Federation v. Wright*, 364 U.S. 642, 650-52 (1961). Resort to a contractual analogy would be particularly inappropriate in the present case. This court has noted in a previous decision with respect to Willowbrook that even for purposes of interpretation, the "Consent Judgment is no mere contract," 596 F.2d at 37.

groceries, as to which the market power arising from defendants' domination of the meatpacking business was thought to give them unfair competitive advantages and to encourage practices violative of the antitrust laws, 286 U.S. at 111, 115-16. The ink had hardly become dry on the decree when the meatpackers began to assail it, see *Swift & Co. v. United States*, 276 U.S. 311 (1928); *United States v. California Cooperative Canneries*, 279 U.S. 553, 555 (1929), the latter of which attempts led to a suspension of the decree for several years. Not daunted by the adverse results in these cases, several of the meatpackers within a year sought major modification in the decree, which the lower court granted to the extent of eliminating the prohibitions mentioned above. The modification on which the Supreme Court passed in *Swift* would have robbed the 1920 consent decree of so much of its force that the Court considered it "revers[al] under the guise of readjusting", 286 U.S. at 119.

The *Swift* decision was analyzed by the Supreme Court in *Chrysler Corp. v. United States*, 316 U.S. 556, 562 (1942) and, more particularly, in *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968). There the United States, rather than the defendant, sought modification of an antitrust decree. The district court read *Swift* as limiting its power to modify to cases involving "(1) a clear showing of (2) grievous wrong (3) evoked by new and unforeseen conditions", 226 F.Supp. 328, 330 (D. Mass. 1967). The Supreme Court held the district court had read *Swift* too rigidly. The language we have quoted *in extenso* must, the Court said, be read in the light of context. "*Swift* teaches that a decree may be changed upon an appropriate showing, and it holds that it may *not* be changed in the interest of the defendants if the purposes of the litigation as incorporated in the decree (the

elimination of monopoly and restrictive practices) have not been fully achieved." 391 U.S. at 248 (emphasis in original).

Our case differs from both *Swift* and *United Shoe Machinery*. Here, as in *Swift*, the modification is proposed by the defendants. But it is not, as in *Swift*, in derogation of the primary objective of the decree, namely, to empty such a mammoth institution as Willowbrook; indeed defendants offered substantial evidence that, again in contrast to *Swift*, the modification was essential to attaining that goal at any reasonably early date. To be sure, the change does run counter to another objective of the decree, namely, to place the occupants of Willowbrook in small facilities bearing some resemblance to a normal home, but any modification will perforce alter some aspect of the decree. An analogy closer than either *Swift* or *United Shoe* is *King-Seeley Thermos Co. v. Aladdin Industries, Inc.*, 418 F.2d 31 (2 Cir. 1969). We there considered a district court's refusal to modify a 1962 consent decree between two manufacturers regarding use by one, Aladdin Industries, of the generic term "thermos" in labels and advertising. Aladdin had sought modification of the decree insofar as it applied to advertising. We noted that the heavy burden applied in *Swift* must be read in the context of that case, in which, for reasons previously outlined, the meatpackers were obliged "to stake their claim on drastic changes in conditions", 418 F.2d at 34. When a case involves drawing the line between legitimate interests on each side, modification will be allowed on a lesser showing:

> While changes in fact or in law afford the clearest bases for altering an injunction, the power of equity has repeatedly been recognized as extending also to cases where a better appreciation of the facts in light

> of experience indicates that the decree is not properly adapted to accomplishing its purposes.

418 F.2d at 35. We therefore remanded in *King-Seeley* for consideration whether, "in the light of experience, the detailed provisions of the decree seriously and needlessly impeded [Aladdin's] exploitation of the generic term and that modification was necessary to achieve the results intended, even though this would take the form of reducing the restrictions imposed upon it", *id.* See also *SEC v. Warren*, 583 F.2d 115, 119-20 (3 Cir. 1978) (commentary on *Swift* and *King-Seeley*).[16]

Two other considerations reinforce our conclusion that the district court imposed far too drastic a standard upon defendants' request for modification. It is well recognized that in institutional reform litigation such as this judicially-imposed remedies must be open to adaptation when unforeseen obstacles present themselves, to improvement when a better understanding of the problem emerges, and to accommodation of a wider constellation of interests than is represented in the adversarial setting of the courtroom. In one of the earliest scholarly explications of institutional reform litigation, Professor Abram Chayes recognized as its most important characteristic that "the trial judge has increasingly become the creator and man-

---

16 Some cases have steadfastly hewed to the *Swift* line. See, e.g., *Humble Oil & Refining Co. v. American Oil Co.*, 405 F.2d 803, 813 (8 Cir.) (Blackmun, J.), *cert. denied*, 395 U.S. 905 (1969); *United States v. Work Wear Corp.*, 602 F.2d 110, 112 n. 6 (6 Cir. 1979); *Holiday Inns, Inc. v. Holiday Inn*, 645 F.2d 239, 240 (4 Cir.), *cert. denied*, 454 U.S. 1053 (1981); *Roberts v. St. Regis Paper Co.*, 653 F.2d 166, 174 (5 Cir. 1981).

Other circuits have distinguished the *Swift* standard in different ways. See *Tobin v. Alma Mills*, 192 F.2d 133, 136-37 (4 Cir. 1951); *United States v. City of Chicago*, 663 F.2d 1354, 1359-60 (7 Cir. 1981) (en banc).

ager of complex forms of ongoing relief, which have widespread effect on persons not before the court and require the judge's continuing involvement in administration and implementation", Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1284 (1976).[17] A principal advantage of the use of injunctive relief in such cases, Chayes added, is that "[o]ver time, the parties may resort to the court for enforcement or modification of the original order in light of changing circumstances", *id.* at 1292.

As experience with this type of litigation increases, a consensus is emerging among commentators in favor of modification with a rather free hand. According to one, the judge who declines to remain involved and to respond flexibly will fail to "respond to the need, present in most institutional reform cases, for phased implementation and small alterations in strategic objectives as new knowledge is acquired", Note, Implementation Problems in Institutional Reform Litigation, 91 Harv. L. Rev. 428, 436 (1977).[18] Another states that "[g]iven the detail of these

---

17 Professor Chayes has recently reaffirmed his view that injunctions in institutional reform cases "are not so much peremptory commands to be obeyed in terms, as they are future-oriented plans designed to achieve broad public policy objectives in a complex, ongoing fact situation", Chayes, The Supreme Court—1981 Term—Foreword: Public Law Litigation and the Burger Court, 96 Harv. L. Rev. 4, 56 (1982).

18 This commentator goes so far as to suggest that full compliance with the court's decree as it is initially framed will rarely be achieved. *Id.* at 431. The writer's conclusion is that:

> when a court determines that the vindication of legal rights of mental patients requires a mental health system to triple its budget, double its staff, reduce its institutional population by seventy percent, and restructure internal administrative patterns and interagency relationships in a few years . . . success on all fronts should not be expected.

Id. at 434.

decrees and the lack of judicial expertise, substantive modification and adjustment are unavoidable and should willingly be undertaken", Special Project, The Remedial Process in Institutional Reform Litigation, 78 Colum. L. Rev. 784, 818 (1978). Another observer notes that "[i]mplementation is an incremental, cyclical process of small steps, each followed by assessment or reaction and further adjustment. Courts must revise decrees repeatedly to cover unforeseen impediments or adverse consequences", Diver, The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions, 65 Va. L. Rev. 43, 63 (1979). See also Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 Yale L.J. 635, 640 (1982). The best statement we have found with respect to the appropriate legal standard for evaluating a defendant's motion for modification of a consent judgment in institutional reform litigation is that of Professor Owen Fiss:

> The judge must search for the "best" remedy, but since his judgment must incorporate such open-ended considerations as effectiveness and fairness, and since the threat and constitutional value that occasions the intervention can never be defined with great precision, the intervention can never be defended with any certitude. It must always be open to revision, even without the strong showing traditionally required for modification of a decree, namely, that the first choice is causing grievous hardship. A revision is justified if the remedy is not working effectively or is unnecessarily burdensome. [Citation omitted.]

Fiss, The Supreme Court—1978 Term—Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 49 (1979). This

view has found judicial expression in *Philadelphia Welfare Rights Organization v. Shapp*, 602 F.2d 1114, 1120-21 (3 Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980). Faced with "a complex ongoing remedial [consent] decree", the Third Circuit upheld a modification sought by the defendants, saying:

> Where an affirmative obligation is imposed by court order on the assumption that it is realistically achievable, the court finds that the defendants have made a good faith effort to achieve the object by the contemplated means, and the object nevertheless has not been fully achieved, clearly a court of equity has power to modify the injunction in the light of experience.

Applications to modify a decree such as that in this case should thus be viewed with generosity.

Here especially great generosity is mandated by the decision in *Youngberg* which we have discussed above. In *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961), the Supreme Court held that a consent decree prohibiting certain acts must be modified when the statutory requirement on which the decree was based was amended so as to permit them. Justice Harlan noted that "the District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce"; hence the court must "be free to modify the terms of a consent decree when a change in law brings those terms in conflict with statutory objectives", 364 U.S. at 651. Justice Harlan took as undisputed the proposition that "a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have arisen", 364

U.S. at 647. We can see no reason for a different view when the requirement is constitutional and a subsequent decision of the Court has made clear that the court entering the decree interpreted the requirement too broadly. *Theriault v. Smith*, 523 F.2d 601 (1 Cir. 1975).

As his opinion discloses (pp. 47 *et seq.*), the district judge felt free to choose between the different views of plaintiffs' and defendants' experts with respect to the value of the limitations on the size of the units to which the residents of Willowbrook were to be transferred. We now know, as a result of *Youngberg*, that this was not the appropriate inquiry. Once the defendants had established, as they unquestionably did, that abandoning the 15/10 and 6/3 bed limitations in favor of a 50 bed limitation would facilitate the emptying of Willowbrook and like institutions, the question was whether, in Chief Judge Seitz's phrase, "professional judgment in fact was exercised" or, in Justice Powell's formulation, "the decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." 73 L. Ed. 2d at 41, 42. We see no merit in the argument of the United States as *amicus curiae* (Brief, p. 38) that defendants irrevocably exercised their professional judgment when they agreed to the consent here; defendants' agreement was premised on their belief, now shown to have been untenable, that they could find enough small facilities to empty Willowbrook within a reasonable time. As said in *Swift, supra*, 286 U.S. at 115, "[t]he consent is to be read as directed to things as they were." Since there is no suggestion that defendants' experts testified in bad faith, we very likely could simply reverse the denial of the defendants' request for modification and direct that it be

granted. However, since *Youngberg* was not available to the parties at the time of the hearing or to the district judge at the time of his decision, fairness seems to make preferable a remand on the narrow issue whether the views expressed by defendants' experts as to the propriety of the 50 bed limitation constituted "professionally acceptable choices" or were "such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."[19]

The district court's findings of noncompliance with the Consent Judgment and its appointment of a Special Master to monitor future compliance are affirmed. The district court's denial of modification of the Consent Judgment and limited modification of the Flower Hospital Order are reversed and remanded for further proceedings consistent with this opinion. No costs.

---

[19] In this connection we note that defendants are by no means alone in contending that placement in small community facilities is not appropriate for all mentally retarded persons. Recent decisions in *Kentucky Ass'n for Retarded Citizens v. Conn*, 510 F. Supp. 1233, 1250 (W.D. Ky. 1980), *aff'd*, 674 F.2d 582, 585 (6 Cir. 1982), and *Garrity v. Gallen*, 522 F. Supp. 171, 195 (D.N.H. 1981), recognize the growing perception among professionals in this field that placement in small group homes in the community may prove neither the "least restrictive" nor the safest alternative for some severely and profoundly retarded persons. See also Diver, *supra*, 65 Va. L. Rev. at 62; Frohboese & Sales, Parental Opposition to Deinstitutionalization: A Challenge in Need of Attention and Resolution, 4 Law & Human Behavior 1 (1980).

APPENDIX B

Denial of Petition for Rehearing, May 9, 1983

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the ninth day of May, one thousand nine hundred and eighty-three.

- - - - - - - - - - - - - - - x

NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN, INC., et al., :

and :

PATRICIA PARISI, et al., :

Plaintiffs-Appellees, :

v. : Nos. 82-7441, 82-7591

HUGH L. CAREY, individually and as Governor of the State of New York, et al., :

Defendants-Appellants. :

UNITED STATES OF AMERICA, :

Amicus Curiae. :

- - - - - - - - - - - - - - - x

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiffs-appellees,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by

Francis X. Gindhart,
Chief Deputy Clerk

APPENDIX C

Opinion & Order of the
District Court, April 28, 1982

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN, INC., et al.

and

PATRICIA PARISI, et al.,

Plaintiffs,

72 Civ. 356/357

-against-

HUGH L. CAREY, individually and as Governor of the State of New York, et al.,

Defendants.

UNITED STATES OF AMERICA,

Amicus Curiae.

----------x

Appearances:

For Plaintiffs:

NEW YORK CIVIL LIBERTIES UNION
84 Fifth Avenue
New York, N.Y. 10011
CHRISTOPHER A. HANSEN, ESQ.
ROBERT M. LEVY, ESQ.
DIANA T. TANAKA, ESQ.
Of Counsel

PAUL, WEISS, RIFKIND, WHARTON & GARRISON, ESQS.
345 Park Avenue
New York, N.Y. 10154
JONATHAN D. SIEGFRIED, ESQ.
HELEN HERSHKOFF, ESQ.
ELIZABETH KOLTUN, ESQ.
Of Counsel

MORTON B. DINKER, ESQ.
THE LEGAL AID SOCIETY
11 Park Place
New York, N.Y. 10007
JAMES M. BESLITY, ESQ.
Of Counsel

HENRY WEINTRAUB, ESQ.
THE LEGAL AID SOCIETY
189 Montague Street
Brooklyn, N.Y. 11201

MURRAY B. SCHNEPS, ESQ.
MICHAEL S. LOTTMAN, ESQ.
299 Broadway
New York, N.Y. 10007

WALTER REDFIELD, ESQ.
1290 Avenue of the Americas
New York, N.Y. 10104

For Defendants:

LeBOEUF, LAMB, LEIBY & MacRAE, ESQS.
140 Broadway
New York, N.Y. 10005
TAYLOR R. BRIGGS, ESQ.
RICHARD C. COLE, ESQ.
KIM HOYT SPERDUTO, ESQ.
LAWRENCE POLLACK, ESQ.
JOY FEIGENBAUM, ESQ.
Of Counsel

HON. ROBERT ABRAMS
Attorney General of the State of New York
Two World Trade Center
New York, N.Y. 10047
CAREN S. BRUTTEN, ESQ.
FREDERICK K. MEHLMAN, ESQ.
Of Counsel

Amicus Curiae: UNITED STATES OF AMERICA

LEONARD RIESER, ESQ.
TIMOTHY COOK, ESQ.
TERISA E. CHAW, ESQ.
Of Counsel
Special Litigation Section
Civil Rights Division
U.S. Department of Justice
Washington, D.C. 20530

BARTELS, District Judge:

This is a motion by plaintiffs to declare the defendants in non-compliance

with the 1975 Consent Judgment and to appoint a Special Master, and a counter-motion by the defendants to modify the Consent Judgment and vacate the court's Order of October 22, 1979.

In 1972 plaintiffs in this action instituted a suit against the State of New York alleging that living conditions and treatment programs at Willowbrook State School for the Mentally Retarded, now known as Staten Island Developmental Center, ("Willowbrook") violated their constitutional and statutory rights and seeking at the same time preliminary injunctive relief to restrict certain abuses and to require improved care. In April 1973 Judge Orrin G. Judd granted relief to the plaintiffs by means of a preliminary injunction against the defendants directing certain enumerated items

of relief in an attempt to correct deficiencies in order to protect the residents from serious physical harm. NYSARC v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973). Subsequently, the United States of America, through its Civil Rights Division, entered the case as amicus curiae. Thereafter extensive negotiations were had between the parties and after the remaining points of contention were settled a consent judgment, approved by the court, was entered in April 1975. NYSARC v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975).

The thrust of the Consent Judgment provided that defendants would reduce Willowbrook to an institution housing no more than 250 residents by April 1, 1981, and that they would transfer class members into community facilities of no

more than 10 or 15 beds, depending upon the particular class member's level of functioning. The Judgment also required defendants to make extensive reforms at Willowbrook with regard to environment, staffing, programming, and various types of therapies. The Agreement included an Appendix A entitled "Steps, Standards and Procedures" which delineated in detail acceptable institutional living conditions and community placements, to which reference is hereby made. As explicated in the Judgment:

> [t]he steps, standards and procedures contained in Appendix "A" hereto are not optimal or ideal standards, nor are they just custodial standards. They are based on the recognition that retarded persons, regardless of the degree of handicapping conditions, are capable of physical, intellectual, emotional and social growth, and upon the further recognition that a certain level of affirma-

> tive intervention and programming is necessary if that capability for growth and development is to be preserved and regression prevented.

Subsequently, in October 1979, plaintiffs and defendants entered into an agreement requiring the placement of half of the multiply handicapped residents of Flower Fifth Avenue Hospital, now known as Flower Hospital, into community facilities of no more than 3 beds and half into residences of no more than 6 beds.

In the six years since entry of the Consent Judgment litigation between the parties has revolved around questions of interpretation, implementation and enforcement of the Consent Judgment. On several previous occasions the parties have appeared before the court because the defendant had failed to live up to

their obligations under the Consent Judgment.[1/]

The motions presently before the court once again involve implementation of the Consent Judgment. Plaintiffs seek an order holding the defendants in non-compliance with the Consent Judgment, specifically those provisions of Appendix A relating to environment (§§ B, R); clothing (§ A(7)); programs and services (§§ B(7), D(1), (2), (5), F(1), (8), G(1), (2), J(1), K(1), (2)); staffing (§§ C(1), (3), (7), (8), L(1)); nutrition (§ H); and community placement (§§ A(1), V(2), (3), (9)). They seek an order demanding compliance, with all deliberate speed, with the community placement provisions of the Judgment, compliance with the other provisions within six months, and the appointment of a Special Master who

would monitor compliance and for whom the defendants would be ordered to provide necessary funding.

Simultaneously, defendants seek an order pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, modifying §§ V(1), V(4), and V(7) of Appendix A of the Consent Judgment and vacating the 3 bed/6 bed Order stipulated to and entered in this action on October 22, 1979. The proposed motion for modification would eliminate the requirements that all class members who are mildly retarded be placed in residential facilities of no more than 15 beds, all those who are more than mildly retarded be placed in residential facilities of no more than 10 beds, and that at least half of those class members residing at Flower Hospital be placed in community residences of no more than 3

residents and the remainder in facilities of no more than 6 residents. Instead the modification would permit defendants to develop a range of community-based facilities housing up to 50 residents.

Of a total original class size of 5343 Willowbrook residents, 1108 have been placed in community residences of the size mandated by the Consent Judgment, 580 have been placed in family care, 557 have died, and 730 have been discharged from state supervision. Of the remainder awaiting placement, 1369 live at Willowbrook (including the Karl D. Warner complex),[2/] and 999 have been transferred from Willowbrook to other institutions managed by the State or private agencies. Such institutions include Brooklyn Developmental Center, a 500-bed institution (including the 50-bed Williamsburg annex) which houses

383 class members: Bronx Developmental Center, a 200-bed institution where 57 class members live; Manhattan Developmental Center, in which 107 of its 150 residents are class members; and Bernard Fineson Developmental Center, which houses 288 class members and which is comprised of three units, Corona, Howard Beach, and Glen Oaks. United Cerebral Palsy manages two facilities in which class members reside: Nina Eaton Center, a 48-bed facility which houses 46 class members and Castle Hill School, a 53-bed institution. In addition about 115 multiply-handicapped class members live at Flower Hospital. The focus of the plaintiffs' motion is living conditions at Willowbrook, but evidence of living conditions at the other above-named institutions was also presented. The defendants' proposed modification affects

class members in any institutional setting[3/] including the above institutions.

The Court has heard 25 days of testimony on these two motions. Both parties and amicus have called upon an impressive array of experienced experts and others. Thirty-nine witnesses in all have testified. Plaintiffs called as expert witnesses Dr. James Clements, Chairman of the Willowbrook Review Panel, member of the Joint Commission on Accreditation of Hospitals' Council on Services for the Retarded and Developmentally Disabled, past Director of the Georgia Retardation Center and past president of the American Association on Mental Deficiency; Kathleen Schwaninger, Assistant Commissioner for Mental Retardation in the Commonwealth of Massachusetts and former Executive

Director of the Willowbrook Review Panel; Lyn Rucker, Executive Director of Region V Mental Retardation Services in Lincoln, Nebraska; and Gerald Provencal, Director of the Macomb-Oakland Regional Center in Mt. Clements, Michigan.[4/] Just as important, the plaintiffs introduced photographs of the conditions they found when they visited Willowbrook and related institutions.

Experts testifying for defendants included Dr. Richard Blanton, Associate Director of the Illinois Department of Developmental Disabilities; Barbara Blum, Commissioner, New York State Department of Social Services and former Director of the Manhattan Placement Unit; Marc Brandt, Executive Director, Sullivan County Association for Retarded Children; Dr. Ella Curry, Director of Willowbrook; Dr. Shervert Frazier, Pro-

fessor of Psychiatry at Harvard University and former Texas Commissioner of Mental Retardation; Dr. Meredith Harris, Director, Nina Eaton Center; Helen Kaplan, Executive Director, Nassau Chapter of New York State Association for Retarded Children ("NYSARC"); Frank Padaven, State Senator and Chairman of the State Senate Committee on Mental Hygiene; Dr. Sue Allen Warren, Professor of Special Education at Boston University; and Zygmond Slezak, Acting Commissioner, Office of Mental Retardation and Developmental Disabilities ("OMRDD").[5/] Experts called by the United States of America, amicus curiae, included George Gray, architect; Dr. Walter Hillabrant, psychologist; Brian Lensink, Assistant Deputy Director of the Arizona Department of Economic Security in charge of Arizona programs

for the mentally retarded; Dr. Andrew Lorincz, physician and Professor of Medicine at the University of Alabama; and Raymond Watts, Registered Sanitarian and environmental health consultant. Pretrial depositions and hundreds of exhibits, including illustrative photographs, have been entered as part of the record, and affidavits, briefs, and memoranda of law have been submitted. The record raises four main issues which the court will address seriatim: (1) Non-compliance with the Consent Judgment; (2) appointment of a Special Master; (3) modification of the Consent Judgment; and (4) Vacation of the 3 bed/6 bed Order of October 22, 1979.

I

The non-compliance charge against the defendants involves a number of

vital areas enumerated below with respect to which the court, after due consideration, has made the findings set forth in the following subheadings.

Sanitation

Section B(3) of the Consent Judgment requires that the living quarters and program areas be kept clean, odorless and insect-free at all times.[6] Contrary to that provision, sanitation at Willowbrook is totally unsatisfactory and presents a serious health hazard to the resident population. Of particular concern is the filthy condition of the kitchens and bathrooms. Both the main kitchen, where the residents' food is prepared, and the satellite kitchens, where the residents' food is served, are filthy and infested with rodents and cockroaches.[7] Cups, bowls,

silverware and pots and pans are improperly cleaned and often caked with food from past meals. Food is served to residents at inappropriate temperatures that encourage food spoilage and the growth of microorganisms, and food storage areas are dirty and foul-smelling. (See, e.g., T. 2034-2089, 2091-92, 2095-96; P. Exs. 143, 146, 148).

Sanitation of the bathrooms in virtually every residential building at Willowbrook is grossly inadequate. Human feces and urine commonly soil bathroom floors, walls, toilets and shower stalls. Non-operational and unflushed toilets filled with human excrement are frequent occurrences, as are cracked and missing toilet seats and bathrooms without toilet tissue, towels and soap. Mold and

mildew, indicative of long-term neglect, grow on many shower surfaces and none of the shower areas are being properly sanitized.[8] (See, e.g., T. 90, 113, 127-130, 1311, 1850-51, 2124, 2133, 2181; P. Exs. 70A-2, 70A-3, 70A-14, 70C-167, 123, 153, 154, 156, 158).

These types of unsanitary conditions permeate the residents' entire living space.[9] Residents, many of whom are nonambulatory, must eat in dining rooms infested with insects and rodents, sit and lie on floors that are dirty, not uncommonly with human excrement, and sleep in bedrooms reeking of urine.[10] Their clean clothes and dirty laundry are intermingled, and trash, food, and clothing litter the floors. (See, e.g., T. 97-100, 116-130, 2107, 2132-33, 4914, 4918; P. Exs.

1, 153, 154, 161, 165, 258, 70A-4, 70A-9).

Defendants have made some efforts to improve sanitation. During her 14-month tenure, Dr. Curry has closed six buildings and increased in-service training efforts. Clearly, however, defendants have not done enough. The evidence shows that during the last two years at Willowbrook, sanitation in the remaining buildings, rather than improving, has steadily deteriorated. (See, e.g., T. 109, 494, 3368-72, 5675).

Sanitation at other related facilities where class members have been transferred is not markedly better than that at Willowbrook. The Bronx Developmental Center has a serious infestation problem, and bedrooms, dining rooms and bathrooms there are

dirty. At Brooklyn Developmental Center the most serious sanitation problems result from its location next to a dump. Smells from the dump waft over the institution, debris floats onto the grounds and flies swarm throughout the buildings. Moreover, the residential areas there are unclean. The level of sanitation in residential areas at Glen Oaks and Nina Eaton Center is also unsatisfactory. (See, e.g., T. 131-34, 151-52, 161, 500-502, 540, 1204-1209, 5813; P. Exs. 70A-15, 70A-16, 70A-95, 70C-142, 70C-145, 82, 97, 98).

Maintenance[11/]

Part of the maintenance problems at Willowbrook, a 50-year-old complex, results from the fact that for years virtually no capital was poured into the physical plant, and until recently

no preventive maintenance measures were taken. The most glaring maintenance inadequacies, though, stem from present, not past, neglect. For instance, throughout the institution shower fixtures lack vacuum breakers which are easy to install and necessary to prevent the transmission of contaminated water. Water control boxes are left open, allowing residents access to the control of the facility's water temperature. Most of the sleeping areas lack curtains, wall decorations, and other personalizing touches. In almost every building there are numerous examples of torn and broken furniture, ripped and broken screens, missing bathroom tiles, nonworking toilets and walls with gaping holes. In many residential areas furniture is sparse and the noise level piercing. (See, e.g.,

T. 312, 648, 1262, 1544, 2099, 2125-27, 5666, 5673; P. Exs. 70B-101, 160, 258).

According to the state's own auditing teams, Willowbrook's maintenance deficiencies are extensive. The March 1981 audit conducted by OMRDD's Audit Compliance Task Force indicated that the level of compliance with the Consent Judgment's "physical environment" requirements was 43.6%. Deficiencies included lack of privacy in bedroom and bathroom areas, poor lighting, a dearth of decorations, curtains and furniture, and broken water faucets. (P. Ex. 1). Six months later the deficiencies, as measured by the September 1981 audit conducted by Willowbrook's Quality of Life Committee, were even more widespread. A greater number of areas lacked decorations and bedspreads, fewer soap dispensers were available,

and insects and rodents, reportedly under control in March, infested 75% of the buildings. In addition, there was an absence of bathroom safety devices in 68.75% of the buildings, 75% of the buildings had windows and screens that were dirty, broken, and in disrepair, 68.75% of the buildings provided inadequate lighting and 62% had broken sinks. (P. Ex. 253).

Maintenance at Brooklyn and Bronx Developmental Centers, Glen Oaks and Williamsburg presents a similar scenario. The most common problems are poorly maintained and nonworking bathrooms, holes in the walls and barren living spaces. Many of the residents' rooms at Nina Eaton Center are decorated, and it is a pleasanter atmosphere, but there too room repairs are not kept current.

(See, e.g., T. 158-160, 175-81, 500-01, 536-43, 668, 722, 1077, 1126, 1598-99, 4936; P. Exs. 70A-17, 70A-22, 70A-33, 70A-35, 82, 98).

Clothing

It is overwhelmingly evident that defendants have not fulfilled their agreement to provide class members with "clean, adequate and seasonally appropriate" clothing.[12/] Some residents at Willowbrook are partially clothed, others go nude, and many wear clothes that are illfitting, badly torn and stained. Shoes are broken and torn, and in winter many of the residents are outfitted in summer attire. In most of the residential buildings clothing is inadequately stored and sorted, residents are not provided with individualized dress, and the

clothing supply is chronically short. (See, e.g., T. 218-225, 494-95, 508, 1819, 3249-3258, 3433-3439, 5666; P. Exs. 70A-45, 70A-46, 70A-49, 70A-62, 70A-63, 70A-66, 70A-68, 135).

The insufficient supply of clothing has an adverse effect on residents' programming. The court adopts the conclusions of Mary Sullivan, Manhattan Borough Representative of the Consumer Advisory Board ("CAB"), that a major programming problem at Willowbrook is residents not attending programming because they have nothing to wear. The court also accepts the testimony of Albert Pfadt, the Administrator of the Willowbrook toilet-training program, that his efforts are seriously hampered by the frequent unavailability of clothing changes and illfitting clothes that are pinned shut so resi-

dents cannot take off their clothes independently.

Certain difficulties are endemic to the population at Willowbrook.[13] Some residents tear their clothing and disrobe. Incontinent class members need frequent changes, and a few with neurological problems cannot be toilet-trained. Most residents, though, can be taught not to disrobe or rip their clothes and most can be trained to use the toilet. In any event, as Dr. Curry, the Director of Willowbrook, acknowledged, the task of providing enough clean, decent clothing to the population at Willowbrook is not insurmountable. (T. 3260).[14] The fact that a job is difficult does not excuse its nonperformance.

Residents of the Brooklyn Developmental Center, the Bronx Developmental

Center and Nina Eaton Center are also improperly dressed. At the Bronx Developmental Center there often is not enough underwear, so residents go to programs without it. Outer clothing is in short supply, so residents either go out in public in inappropriate or frayed clothing or have to remain on their unit. For example, in January 1981 one class member, J.D., missed participating in the New York State Special Olympic Games because he lacked winter clothing. (See, e.g., T. 217-218, 241, 521-22, 1117-1119, 1875-76; P. Exs. 70A-56, 70A-57, 70A-59, 70A-60, 70C-141, 82, 132, 135).

Programming

Mentally retarded individuals, even those severely and profoundly retarded, are capable of growth. If

a mentally retarded individual is to develop, though, he must be provided with programming that is geared to meet his individual needs at his own level of development. To that end the Consent Judgment requires the formulation of an individual program plan for each class member and the provision of six hours of formal programming each weekday.[15/]

There are four major program areas at Willowbrook. In the Elizabeth Connelly Center (Building 8) the lowest functioning residents receive programming in the areas of sensory stimuli, body awareness, personal hygiene and activities of daily living. Those clients who do not need basic skills training are taught conceptual skills in the Education Building (Building 3). In the Work Activity Center (Building 61) the highest functioning resi-

dents[16/] work on contracts, in five different work areas of varying difficulty, in exchange for compensation. In addition, 39 residents who suffer from both visual and aural deficiencies participate in the Deaf-Blind Program (Building 2), the goal of which is to help them become as self-sufficient as possible.

Although the Willowbrook administration has constructed a commendable framework in which to provide programming, serious deficiencies exist in the delivery of programs. Residents rarely receive six hours of appropriate programming. Often they arrive late at the program area or do not arrive at all because of lack of transportation or clothing. At least five residents in Building 21 do not attend any programming outside of their residence, and

there is no indication that their residence provides them with any structured activity. Even when residents do arrive at the programs, they receive little actual instruction. Residents sit idly, walk about aimlessly, self-stimulate and sleep. They are frequently left unattended, and even when staff is present, interaction between staff and residents is minimal. While some programming at Willowbrook, notably the Deaf-Blind program, is first rate, programming compliant with the Consent Judgment is the exception rather than the rule. (See, e.g., T. 259-60, 274-75, 1416-25, 5533-43; P. Exs. 1, 70A-78, 70A-80, 70D-158, 70D-160, 117, 118, 119, 123).

A contributing factor to the low quality of programming at Willowbrook is deficiencies in program design.

Defendants have been remiss in developing and implementing individual development treatment plans, as prescribed by the Consent Judgment. The individual plans, developed at case conferences by an interdisciplinary team, are dependent upon written staff evaluations and staff participation at the meetings. Written evaluations are consistently missing, and staff attendance at the conferences is deplorably low.[17/] Because of inadequate staff input, the interdisciplinary team is unable to develop an accurate assessment of clients' needs and cannot establish effective program goals. Often the resultant program plans are neither comprehensive nor accurate. They do not address the whole range of the residents' needs, and they prescribe goals that are inappropriate or have already been attained. Even

when program plans are up-to-date and complete, direct care staff is often unaware of what the treatment plan and goals are and fails to implement the program prescribed by the treatment committee.

While programming at Flower Hospital and Nina Eaton Center appears to be satisfactory, programming efforts at the Bronx, Brooklyn, and Manhattan Developmental Centers mirror those at Willowbrook. (See, e.g., T. 528, 1459, 1870-72, 5688-89, 5706-07; P. Exs. 70-C-151, 82, 98, 135).

Special Therapies[18/]

Many Willowbrook residents diagnosed as needing recreational, occupational, physical, speech and psychological therapy are not receiving these services. Although a large number of

residents have serious behavior disorders, no behavior modification program was established at Willowbrook until September 1981, and then it was only made available to four residents. Adaptive and positioning equipment is critical for many Willowbrook class members. If used correctly, it can prevent the progression of such debilitating conditions as scoliosis, curvature of the spine and other severe orthopedic handicaps. If the equipment is not used, though, or if it is misused, individuals who require it can suffer further deformities and can develop acute medical problems. The lack of and misuse of adaptive and positioning equipment at Willowbrook is widespread. Dr. Lorincz, a physician who toured Willowbrook for amicus, testified that he did not see one

instance of appropriately used adaptive equipment. The court adopts his characterization of Willowbrook's misuse of adaptive and positioning equipment as a medical emergency. (See, e.g., T. 5335-37, 5339-42).

Recreation[19/]

Life in the residential units of Willowbrook, Bronx Developmental Center, Brooklyn Developmental Center, Manhattan Developmental Center, Nina Eaton Center and Glen Oaks is sterile, dreary and one of enforced idleness. Contrary to the Consent Judgment's requirement of two hours of recreation daily, most class members, when not in their program areas, have nothing to do. There is virtually no recreation equipment, toys or games on their units, and very little organized leisure-time

activity occurs. In fact, the high incidence of behavior problems among institutionalized class members is at least partially attributable to the residents' long hours of idleness.

The residents' idleness is also counterproductive to their learning of new skills. In order for profoundly and severely retarded individuals to benefit from programming, the skills they learn must be constantly reenforced. Staff on residential units must support and provide continuity for daytime program efforts, such as teaching residents to brush their teeth, to toilet and dress themselves and to refrain from self-abuse. Regrettably, however, on none of the residential units does there appear to be any carryover of daytime skills training. (See, e.g., T. 1544,

1821-22, 5629-30, 5545-46; P. Exs. 1, 128).

Nutrition[20/]

The Willowbrook diet card system, established to ensure that residents who require special diets receive them, is not being properly administered. Most residential buildings lack current diet cards, and when they are available, staff does not always consult them. Consequently, residents who need special diets do not consistently receive them. At least one Willowbrook resident choked to death as a result of being served an improper diet.[21/]

Only two residential buildings at Willowbrook provide residents with feeding programs, as prescribed by the Consent Judgment. Moreover, the only utensils given to most residents, regardless of their functioning level,

are spoons, and often there are not even enough of them to go around. The Bronx Developmental Center, Brooklyn Developmental Center and Nina Eaton Center similarly fail to provide residents with feeding programs and adequate utensils. (See, e.g., T. 538-40, 694, 1121-23, 5691-92, 5701, 5787; P. Ex. 102).

Staffing Ratios

The Consent Judgment mandates minimum staffing requirements for direct care staff and mid-level supervisors.[22/] The aggregate number of staff employed at Willowbrook is sufficient to comply with the staffing requirements of the Consent Judgment. Yet, defendants consistently fail to provide class members with the required level of supervision. Part of the problem is lack of staff

training, lack of staff dedication, and staff negligence. Even when enough employees are on duty, residents are frequently left unattended or attended by fewer than the mandated number of employees. Even when sufficient staff members are present, they often ignore residents, depriving class members of the "appreciable and appropriate attention by direct care staff" as required by the Consent Judgment. The difficulty in terminating civil service employees could be one explanation. Another explanation is the failure of management to provide direct care staff consistent enough supervision. Moreover, because of absenteeism and lateness, which are chronic problems at Willowbrook, many employees must work overtime. Working long tours with severely retarded clients creates a considerable strain

on employees and contributes to their poor attention to residents' needs.

Staff deployment at Willowbrook is also deficient. As defendants note, Willowbrook is compliant with direct care and mid-level staffing requirements measured on a weekly and institution-wide basis. The Consent Judgment, however, requires compliance by building. Just because sufficient staff is on duty on an institution-wide basis does not mean that employees are properly deployed to each building, so that all class members receive adequate care. Moreover, measuring compliance on a weekly basis is misleading, and it does not adequately further the Consent Judgment's goal of providing class members with appropriate care. If the institution has a shortage of staff some days of the week and a surplus other days of the week - such as

often occurs on paydays - the average for the week may come out even and the days out-of-compliance may be hidden, and the problem of understaffing ignored.

Measured on a daily, building-by-building basis defendants do not consistently provide class members with the direct care and mid-level staffing ratios mandated by the Consent Judgment. Plaintiffs introduced a series of charts showing defendants' level of non-compliance for direct care staff for the day and evening shifts at Willowbrook, Bronx Developmental Center, Glen Oaks, Brooklyn Developmental Center and the Corona unit of the Bernard Fineson Developmental Center and showing mid-level staffing on the day and evening shifts at Willowbrook and the Bronx Developmental Center. (P. Ex. 61). These charts show serious staff short-

ages. For example, out of a total of 665 shifts on a building basis at Willowbrook, on only 26 shifts were all of the buildings in compliance.

The defendants challenged the plaintiffs' findings of Willowbrook direct care staffing deficiencies on the ground that the underlying data, the "Daily Compliance with Staffing Ratios" forms, which were prepared by Willowbrook staff, cannot be used to measure staffing compliance unless three adjustments are made: (1) the factoring out of level of staffing compliance in the so-called shared-staff buildings, managed for the state by United Cerebral Palsy; (2) an adjustment of staffing requirements to account for residents who are away from their buildings, who are "on leave;" (3) an adjustment for the availability on a

building-wide basis for staff members assigned on a one-to-one basis to particular class members. James Walsh, Willowbrook Deputy Director of Institutional Administration, interpreted Section C(4) of the Consent Judgment as permitting that type of averaging. That section provides for lower ratios in certain living units within a building to provide higher staff-to-resident ratios in another living unit in the same building "provided that such deviation is not regular, chronic or permanent . . . ."

The court agrees that in order to accurately measure Willowbrook's direct care staffing levels, plaintiffs' charts must be adjusted to account for residents on leave. If residents are absent from a building, naturally the number of staff required in that building decreases pro-

portionately. The defendants' other adjustments, though, clearly lack merit. The first adjustment, that the staffing deficiencies in the shared-staff buildings must be ignored, is invalid. Defendants cannot avoid accountability under the Consent Judgment by contracting for services with private agencies. Moreover, in the buildings at Willowbrook managed by United Cerebral Palsy, direct care staff are state employees, and although United Cerebral Palsy schedules shifts, the state is responsible for staff assignments there and for sending the shared-staff buildings "pool" employees to cover staff shortages.

Defendants' contention that they should not be penalized for providing enriched, i.e., more intensive, staffing than is required by the Consent Judgment is also unpersuasive. As defendants

acknowledge, Willowbrook residents are generally assigned one-to-one staffing because they have severe behavior problems. Willowbrook's enriched staffing program appears to the court to be a diluted form of behavior modification program prescribed by the Consent Judgment. In any event, it is clear that employees assigned to enriched staffing are not available to supervise other residents. The result of defendants' suggested adjustment to the staffing requirements would suggest approval of inadequate staffing for many class members not on enriched staffing. Section C-4 of the Consent Judgment does not condone that type of statistical juggling. Its purpose is merely to permit defendants some flexibility in dealing with unusual staffing demands that are not "regular, chronic or permanent."

The one appropriate adjustment to defendants' compliance forms - to compensate for residents on leave - does modify plaintiffs' claims. However, even after making this adjustment, the court must conclude that defendants generally are not in compliance with the Consent Judgment staffing requirements. In particular, on the evening shift and on weekends few residents are on leave, and the charts' showing of consistent noncompliance with respect thereto remains virtually unaltered. For example, on the August 1, 1981 day shift, which was a Saturday, the adjustment for residents on leave does not change staff requirements, as measured by the plaintiffs' chart, in any building, except two, whose requirements are reduced by one employee.

Accordingly, the direct care staff deficit on that date is 27 as opposed to a deficit of 29, as claimed by plaintiffs.

Defendants also challenge the mid-level staffing deficits at Willowbrook as submitted by plaintiffs. They contend that plaintiffs should have counted on-duty nurses as supervisors in order to offset mid-level supervisory shortages. Section C(7) of the Consent Judgment does contemplate nurses serving as mid-level supervisors under certain circumstances. Defendants' forms which plaintiffs utilized in preparing their charts indicate those tours when a nurse is so utilized. Since the plaintiffs did count Willowbrook nurses as supervisors when defendants' forms indicated that that was their function, this objection by defendants is groundless.

Another inadequacy in staffing is the failure of the defendants to provide class members with an adequate number of case managers. On September 9, 1980 the court issued an order requiring the state to provide one case manager for every 20 class members. The state has not complied with this order. Eight case managers in the Bronx with class members on their caseload carry more than 20 clients; in Manhattan one case manager carries more than 20 clients and moreover, 9 class members have no case manager; and in Queens County 9 case managers have caseloads greater than 20. The state made no effort to obtain a stay of this order but instead flagrantly disregarded it until the order was affirmed by the Court of Appeals on June 30, 1981.

Based upon the foregoing, the court finds non-compliance by the defendants with the provisions of the Consent Judgment above mentioned.

II

In 1975, when Judge Judd signed the Consent Judgment, it was apparent to all that some type of monitoring of the state's obligations was necessary. Accordingly, the parties agreed to the appointment of a Review Panel (Consent Judgment ¶¶ 9 et seq.). The record shows that the progress made by the defendants in the first four and a half years after the entry of the 1975 Consent Judgment was in no small degree due to the monitoring, reporting and recommendations of the Review Panel. In 1979, however, the New York State Legislature deleted from the budget the funding provision

for the Review Panel in the Consent Judgment and thereby for all intents and purposes removed the Review Panel from its monitoring position. Since that time, as might have been expected, conditions at Willowbrook have materially deteriorated. Consequently, the crucial issue which is now presented to the court is how can the court fashion a remedy to enforce compliance with its decree.

The court has always had the equity power to fashion the relief necessary to protect its judgment against future violations. Cooper v. Aaron, 358 U.S. 1 (1958); Brown v. Board of Education, 349 U.S. 294 (1955); Hart v. Community School Board of Brooklyn, 383 F.Supp. 699, 755 (E.D.N.Y. 1974), aff'd, 512 F.2d 37 (2d Cir. 1975). This power arises equally from consent judgments as well as final

judgments following trials. Beloit Culligan Soft Water Service, Inc. v. Culligan, Inc., 274 F.2d 29 (7th Cir. 1960); Aspira v. Board of Education of City of New York, 423 F.Supp. 647 (S.D.N.Y. 1976). As stated by this Circuit: "[T]he district court [has] not only the power but the duty to enforce a settlement agreement which it [has] approved . . ." Meetings & Expositions, Inc. v. Tandy Corporation, 490 F.2d 714, 717 (2d Cir. 1974). Accordingly, plaintiffs now move for the appointment of a special master to guarantee future compliance with the Consent Judgment.

Rule 53 of the Federal Rules of Civil Procedure expressly authorizes this procedure by the appointment of a special master as an exception to the general rule. Similar to the case at

bar is Gary W. v. State of Louisiana 601 F.2d 240 (5th Cir. 1979), involving the level of care the State of Louisiana was providing its developmentally disabled citizens who found themselves in Texas institutions. In approving the district court's subsequent appointment of a Rule 53 special master, the court remarked that the appointment of a special master was not extraordinary, citing many cases involving similar facts and problems. Finally, the court observed:

> These proceedings have now been pending for over four years and a significant number of the children involved still have not been accorded the relief ordered. These two unfortunate facts belie the appellants' claim that the District Court abused its discretion in ordering the appointment of a Special Master.

Id. at 245. We have an almost identical situation here. Considering the past

violations of the Consent Judgment there is more than ample precedent to find exceptional circumstances justifying the appointment of a special master to protect the class members from harm.

But the court need not rely solely on Rule 53 for its equity power to provide itself with the appropriate instrument to enforce its decree. In the early case of Ex Parte Peterson, 253 U.S. 300, 312-13 (1920), the Supreme Court, through Mr. Justice Brandeis, pointed out that this power derives from the courts'

> inherent power to provide themselves with appropriate instruments required for the performance of their duties . . .

and

> to aid judges in the performance of specific judicial duties, as they may arise in the progress of

> a cause. From the commencement of our Government, it has been exercised by the federal courts, when sitting in equity, by appointing, either with or without the consent of the parties, special masters, auditors, examiners and commissioners.

To the same effect is Schwimmer v. United States, 232 F.2d 855, 865 (8th Cir.), cert. denied, 352 U.S. 833 (1956), where the court said:

> Beyond the provisions of Rule 53, Federal Rules of Civil Procedure, 28 U.S.C.A., for appointing and making references to Masters, a Federal District Court has "the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential." (Citations omitted.)

Consequently, either under Rule 53 or in accordance with the court's inherent power to provide equitable relief, this court is able to appoint a special master to ensure compliance with its judgment.

The defendants offer many arguments why a special master should not be appointed predicated upon (i) their good faith and substantial performance; (ii) impossibility of performance because of changed conditions; (iii) creation of adversary relationships; (iv) duplication of efforts since Willowbrook is already monitored by fourteen separate agencies; and (v) violation of established principles of federalism.

The court has no doubt about the good faith of the defendants in attempting to comply with the Judgment, but the court does not find substantial performance. Good faith and efforts, however, are no excuse for failure to comply with provisions so necessary for the protection of the handicapped clients. Rozecki v. Gaughan, 459 F.2d 6, 8

(1st Cir. 1972); Gautreaux v. Chicago Housing Authority, 384 F.Supp. 37, 38 (N.D. Ill. 1974). Defendants cite Panitch v. State of Wisconsin, 451 F.Supp. 132, 133-34 (E.D. Wis. 1978), in support of their contention. Panitch presents an entirely different factual pattern than the situation here. In that case, involving an injunction compelling education of handicaped children, the School District had eliminated the backlog of handicapped students awaiting placement and also reduced the number of such students awaiting evaluation. In other words, there was substantial improvement and progress. In all events, such progress and improvement does not exist in this case. See Welsch v. Likins, 373 F.Supp. 487 (D.Minn. 1974); United States v. Dothard, 373 F.Supp. 504 (M.D. Ala. 1974).

As discussed under heading III below, performance is not impossible becaue of changed conditions. The claim of adversary relationships resulting from the appointment of a special master is simply not supported by evidence or experience.

It is true that Willowbrook is now monitored by fourteen different agencies, five of which existed before the entry of the Consent Judgment. The only two bodies which perform any monitoring against the decree, the Willowbrook Quality of Life Monitors ("QLM") and OMRDD's Consent Decree Office Audit Compliance Task Force ("CDO") consist entirely of defendants' employees. QLM monitors only Willowbrook, not the other facilities or homes, and CDO performs its monitoring function only once a year. Moreover, despite the existence

of these fourteen monitoring groups, they have failed to adequately supervise or in any way enforce full compliance with the Consent Judgment. What is needed is an independent body for compliance purposes which can orient and co-ordinate the reports and programs of the present agencies. In the successful performance of his services the special master would hasten the day when the Consent Judgment will be fully implemented. The role of the master would be to act "as an arm and as the eyes and ears of the court." Palmigiano v. Garrahy, 443 F.Supp. 956, 986 (D.R.I. 1977). His duties would go beyond those of the present monitoring agencies. As a matter of fact, if the special master were satisfied with the accuracy and objectivity of the data now collected by OMRDD and the other monitoring bodies,

there would be no necessity for him to engage in their particular activities. His task would be to integrate and harmonize that data for the purpose of implementing and enforcing compliance with the Consent Judgment, a task which none of the other bodies monitoring Willowbrook and related facilities can accomplish. Predicated upon her experience with a special master in Massachusetts, Commissioner Schwaninger recommended the appointment of a special master for the purpose of enabling the New York Commissioner to "respond to the needs of our mentally retarded population in a more timely way." (T. 5822).

Finally, defendants charge that the appointment of a special master under these circumstances would violate certain fuindamental precepts of federalism, thus rendering such appointment unconstitu-

tional. This argument may be divided into two contentions: the appointment would unconstitutionally interfere with New York State's right to direct its own affairs; and a mandate to New York to assume responsibility for compensating such a master would unconstitutionally interfere with New York's sovereign right to allocate its own tax dollars.

As to the first part of the argument, Rule 53, as heretofore pointed out, specifically authorizes the appointment of a special master and the cases are clear that such powers of monitoring by a special master are within the limitations of Rule 53. Taylor v. Perini, 413 F.Supp. 189 (N.D. Ohio 1976); Costello v. Wainwright, 387 F.Supp. 324 (M.D. Fla. 1973), aff'd, 489 F.2d 1311 (5th Cir. 1974). See Gary W. v. Louisiana, supra; Amos v. Board of School

Directors of Ccity of Milwaukee, 408 F.Supp. 765 (E.D.Wis.), aff'd sub nom. Armstrong v. Brennan, 539 F.2d 625 (7th Cir. 1976), vacated on other grounds, 433 U.S. 672 (1977); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F.Supp. 1257 (E.D.Pa. 1971), modified, 343 F.Supp. 279 (1972). See also Note, 91 Har.L.Rev. 428 (1977).

The court, of course, recognizes the delicate balance between the judiciary, Legislature and the Executive. Dimarzo v. Cahill, 575 F.2d 15 (1st Cir. 1978). Since the effect of the appointment of a special master would be prospective, it is not forbidden by the Eleventh Amendment. In fact, since the defendants have consented to this Judgment, it is difficult to see how they can interpose that bar. Indeed, Edelman v. Jordan, 415 U.S. 651, 667-68 (1974), recognizes

that such relief is available without a violation of the Eleventh Amendment even though the decree imposes financial burdens and will have fiscal consequences to a state treasury as the necessary result of compliance. See Vecchione v. Wohlgemuth, 558 F.2d 150, 158 (3d Cir.), cert. denied, 434 U.S. 943 (1977). By appointing a special master the court does not control, manage or supervise the operation of Willowbrook. It simply seeks a tool by which it may monitor and enforce the state's performance of its obligations.

As for the second aspect of defendants' challenge, the court is aware of the fact that the specific allocation of state resources among its conflicting needs is a political matter to be resolved by the Legislature. Jefferson

v. Hackney, 406 U.S. 535 (1972); New York State Association for Retarded Children v. Carey, 631 F.2d 162 (2d Cir. 1980); Evans v. Buchanon, 582 F.2d 750 (3d Cir. 1978). It does not follow from this principle, however, that plaintiffs' constitutional rights or their right to full compliance with a consent judgment can be violated or ignored. If compliance requires the expenditure of funds the court thereby does not allocate the state's resources. It is the duty of the court to attempt to enforce its judgments. There are innumerable cases supporting the proposition that permits the assessment of costs against defendants for compensating a special master. Milliken v. Bradley, 433 U.S. 267 (1977); Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974); Welsch v. Likins,

supra; Hart, supra; Gary W., supra. Moreover, Rules 53 and 54, F.R.Civ.P., specifically authorize the assessment of such costs against the defendants in these circumstances.

The court has decided to appoint a special master with full powers afforded under Rule 53, F.R.Civ.P. The appointment will not permit the special master to assume the operation of the Office of Mental Retardation and Developmental Disabilities nor to decide disputes between the parties. However, the master's efforts will be directed to the development of a plan to eliminate widespread violations of the Consent Judgment at Willowbrook and related facilities; to report periodically non-compliance with the provisions of the Consent Judgment; to assist in the

accomplishment of the community placement provisions of the Consent Judgment; and finally, to monitor the implementation of the provisions of the Consent Judgment. Before such appointment, however, the court invites both parties to submit on or before the 14th day of May, 1982, two (2) names each of eligible persons for the appointment of a special master and to file with the court a plan suggesting the delineation of the duties and obligations of the special master and the funding necessary for his compensation and for an adequate staff and an adequately equipped office.

III
A

Defendants have moved for modification of paragraphs V(1), V(4) and V(7) of the Consent Judgment on the ground that such modification is necessary in order to realize the goal of community placement for Willowbrook class members. In support of their motion they rely on Rule 60 of the Federal Rules of Civil Procedure. Rule 60(b) provides that the court may relieve a party from a final judgment, order, or proceedings for the reasons set forth in subdivisions (5) and (6) as follows:

> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.23/

Defendants claim that the above sections of the Consent Judgment are no longer adapted to accomplish their purpose because of the housing shortage in New York City and the other obstacles mentioned by them which militate against community placement of non-ambulatory, non-self-preserving Willowbrook clients. The issue is whether "it is no longer equitable that the judgment should have prospective application."

The defendants' argument for modification is two-pronged. They contend, first, that size limitation is not that important a consideration for the Willowbrook population and that class members can be served as well - and in some cases better - in facilities that accommodate between 11 and 50 residents. Second, they argue that the interplay of current housing conditions in New York City with

the Consent Judgment's rigid size restrictions has caused Willowbrook class members to remain in an institutional environment an unnecessarily long time. Consequently, they say, §§ V(4) and V(7) of the Consent Judgment[24/] are not properly adapted to accomplishing their purpose of providing class members with the least restrictive and most normal living conditions possible, and they should be abandoned.

We turn first to the argument that facilities accommodating between 11 and 50 residents provide as good - and in some instances better care - than the smaller community facilities presently mandated by the Consent Judgment and by the 3 bed/6 bed Order. The thrust of most of defendants' testimony was that size is not a critical factor in determining the best community placement for

profoundly retarded persons. Professor Sue Allen Warren expressed the opinion that the compassion of staff, not the size of a facility, is the significant factor and that a mentally retarded person's developmental needs can be cared for as well in a 50-bed facility as in a 10-bed facility. In fact, in her opinion, a larger facility has important advantages: it can more easily obtain the necessary professional staff, there is less professional isolation, and mentally retarded individuals there have greater opportunities to develop friendships than they do in small facilities. Citing the work of Professor Landesman-Dwyer, she concluded that there is not enough clinical data to support the efficacy of the court's present size limitations, and that a range of community-based facilities should be developed.

Dr. Blanton stated that a range of facilities housing up to 100 mentally retarded individuals would be appropriate. He testified that while size is one factor to consider in developing community placements, location, availability of services and orientation of the community are more important. Commissioner Slezak concurred that a range of facilities should be developed. He testified that mental health practitioners should not force individuals into small units because of an illfounded preconception that smaller units are less restrictive, and that facilities larger than 10 beds are particularly appropriate placements for severely handicapped individuals who require nursing care or who have special disabilities such as behavior problems. In his opinion, residences housing up to 50 individuals can be home-like and can

provide excellent care.

Ms. Blum agreed that a range of facilities should be considered for certain individuals. She continued that for those who are multiply handicapped or severely emotionally disturbed, both small and moderate-sized facilities are appropriate placements. Moreover, because intermediate-sized facilities are vastly superior to Willowbrook, difficult-to-place clients should be sent to them rather than just left to deteriorate at Willowbrook. Transitional placements in intermediate-sized facilities are also useful for assessing residents' abilities and needs before their final placement. Such assessments, she believes, cannot be done as expeditiously in the community as in intermediate-sized facilities, and they are not done adequately at Willowbrook.

Marc Brandt also endorsed the view

that 35- and 50-bed facilities can be very humane and therapeutic. He stated that as transitional facilities they provide excellent alternatives to the institutionalized environment of Willowbrook, and they are good permanent homes for individuals who have such severe medical problems that they need continuous monitoring in a specialized facility.

Two of defendants' witnesses emphasized the medical barriers to placement in small facilities. Dr. Philip Ziring testified that the approximate 300 multiply handicapped residents at Willowbrook and the 115 residents at Flower Hospiral require 24-hour access to medical experts. He opined that communities are not presently capable of providing adequate medical care, and therefore that multiply handicapped class members should not reside in facilities

of 10 beds or fewer. Dr. Shervert Frazier agreed. Focusing on Flower Hospital residents, he testified that they have special needs that require immediate access to trained medical personnel. To justify the continuous presence of experts, physicians and therapists at any given facility, he believes, there must be a "critical mass" of disabled individuals, which a facility of 50 beds, but not a residence of 10 beds, can provide.

Experts for plaintiffs and amicus disagreed sharply with defendants. They testified that the size of a residence is the most critical factor in ensuring the growth and development of Willowbrook class members and that even individuals with behavior problems and medical disabilities benefit from placement in facilities of 10 residents or fewer. The

reason size is so important, they asserted, is because of the severe developmental handicap of class members. Severely and profoundly retarded individuals, who comprise 85-90% of the Willowbrook population awaiting placement, have developmental levels between that of an infant and a two-year old. Commissioner Schwaninger, Dr. Clements and Commissioner Lensink contended that because of the class members' limited intelligence they can develop only if their programming and care are extremely consistent. Commissioner Schwaninger explained that the development of one or two close emotional relationships is vital for these individuals, for people who are so profoundly retarded start developing and growing at the basic level of emotional relationship. She added that although, theoretically, in a 35- or 50-bed facil-

ity, one staff person could be assigned permanently to 4 or 5 residents and a close emotional relationship could develop, because of the sheer demands of numbers, that does not occur.

Dr. Clements emphasized that consistency of programming is vital for these clients. The larger the facility the larger the number of employees who have to become totally familiar with an individual's program in order to deliver it in a consistent manner and the less likely appropriate programming will occur. Commissioner Lensink added that profoundly retarded individuals have a great deal of difficulty generalizing and intergating new skills. Consequently, in order for them to learn they must be in a small setting where they do not have to contend with a distracting panoply of activity. Small community residences are

also better at reinforcing basic skills, such as tooth brushing, in an appropriate place, at an appropriate time, and with the undistracted attention of staff, so that the retarded individual can truly grasp what he is learning.

Barbara Gacek, who runs six small group homes and two satellites, agreed that the type of individualized program necessary for the severely retarded can best be accomplished in a facility for 10 residents. She testified:

> We really feel that the small placement of ten is ideal to create a home-like environment for these children, to personalize their individual attention, to allow the staff to know each client, not just as a name but as a person with individual likes and dislikes, feelings and idiosyncracies, so if in our concept you are increasing the numbers, you are decreasing the ability to provide that kind of philosophy....
>
> One of the things that we are

> very insistent on is that our children's mental age is at best between 12 months and 3 years. They are, therefore, on a preconcrete or concrete level of development. If you are going to teach a skill you are going to have to teach it in the appropriate place at the appropriate time. The finger painting is, as an example, you cannot do finger painting in a dining room at 4:00 and then expect the children at 5:00 not to finger paint with their chocolate pudding. They can't make that kind of an association. You have to make sure that the arts and crafts, every other skill, is done in the appropriate place.

Witnesses for plaintiffs and amicus agreed that small settings are particularly important for class members with behavior problems, for their problems are aggravated by larger groupings. They also challenged defendants' assertion that class members with medical problems cannot be placed in small community residences. Dr. Lorincz

testified that less than a dozen Willowbrook residents needed hospital-style care. He explained that while multiply handicapped residents at Willowbrook are physically dependent, they are medically stable, and if staff has been trained to cope with their handicaps, these individuals' needs can be better met in a small group home than in a 20- or 50-bed facility. Lyn Rucker, who toured Flower Hospital, echoed his testimony, and stated that she saw only four Flower Hospital residents who needed long-term placement in a hospital and for whom a small community placement might be inappropriate. Commissioner Schwaninger, Commissioner Lensink, Lyn Rucker, and Gerald Provencal all testified that as directors of state community placement efforts, they had placed physically handicapped clients with the same types

and degrees of handicapping conditions as those residents at Willowbrook and Flower Hospital into the community.

After serious consideration of all the evidence the court is persuaded by the plaintiffs' witnesses and is convinced that the needs of the Willowbrook class members are better met in small group homes than in facilities ranging in size from 11 to 50 beds. It should be noted that this conclusion is not the first determination in this case of the most appropriate placement for these individuals. After three years of litigation both plaintiffs and defendants agreed in 1975 that the objectives of integration and normalization were best accomplished for profoundly and severely retarded individuals by placement into facilities of 10 beds or fewer. Plaintiffs, as well as defendants, made

concessions to obtain this agreement, which Judge Judd signed as a Consent Judgment. Then, in 1977 this court disapproved establishing Bronx Developmental Center as a transitional placement for class members, and in 1978, after a hearing, the defendants once again agreed with plaintiffs that small placements are important for the retarded, in that instance for the 115 multiply handicapped residents at Flower Hospital.

The thrust of defendants' current argument seems to be either that professional knowledge has changed or that practical experience has shown that the qualilty of care is the same in facilities sized from 1 to 50 residents, with the exception that for certain individuals, facilities larger than 10 beds are even better. Defendants have not demonstrated that professional opinion dis-

counts size as an important factor in developing quality community placements. On the contrary, those experts with direct experience in placing clients similar to Willowbrook Class members - including defendants' witness Dr. Blanton - concur that the trend throughout the country is toward smaller residences. It is true, as defendants point out, that from 1960-1970 Scandinavia developed numerous 40-60 bed facilities, but the result of that experience has been that professionals there are unhappy with the care provided in those facilities and want to replace them with smaller residences.25/

It is clear to the Court that an essential purpose ofthe Consent Judgment, placement in small community facilities, is still an important goal. This is because residents in small community

residents receive the type of individualized and consistent care necessary for them to develop to their full potential and because there they benefit from a setting that best approximates the way most non-retarded people live. The upward limit of 10 is based upon experience and embodies the parties' agreement as the best way to ensure that community facilities will provide a nurturing home-like environment.

The evidence clearly demonstrates that institutions larger than 10 beds do not provide class members with as good care and as nromalized an environment as do homes designed for 10 residents or fewer. Witnesses for both plaintiffs and defendants agree that the small group homes presently operating in New York State provide class members with excellent care. The evidence shows that the

care provided in larger facilities, like Nina Eaton Center, Sullivan County ARC, Glen Oaks and Williamsburg, is non-individualized and regimented. In fact, as demonstrated above, most of these facilities fail, in important respects, to provide class members with the most basic services mandated by the Consent Judgment.

In addition, the evidence shows that group homes of 10 or fewer are better integrated into the community than facilities larger than 10. The rationale of the Consent Judgment's requirement that class members shall move from "segregated from the community to integrated with the community living and programming" is that retarded individuals model their behavior more appropriately from the example of and through access to nonretarded individuals and they learn more readily and develop more fully from

exposure to normal everyday living. Residents in group homes spend more time in the community than do residents in larger facilities. For example, in contrast to residents in small group homes, who do out to the community for programming on a daily basis, only two of the 35 Sullivan County ARC residents go out for programming and only 12 of the 48 Nina Eaton residents program outside of ths institution.

By the same token, the larger the facility the less likely it is that residents will become part of the community and will be accepted by their neighbors. Larger community facilities exacerbate community opposition to and fear of the retarded. This is because neighbors have more difficulty adjusting to a large group of individuals who appear to be different, and have more

difficulty in breaking down stereotypes in order to see these residents as individuals who happen to be retarded. In other words, their retardation continues to stigmatize residents in larger facilities, which can affect the way they view themselves, and the way neighbors, staff, and even their families, treat them.

Although the level of care at certain of the moderate-sized institutions is superior to that presently provided at Willowbrook, it is still inadvisable and unwise to develop these facilities as transitional placements. Four years ago the parties fully litigated the wisdom of developing transitional facilities when the state proposed to use the Bronx Developmental Center for such a purpose. At that time this court concluded that such a transitional

placement would simply delay community placement and frustrate one of the chief purposes of the Consent Judgment. (Order, June 10, 1977). Experience since then has re-enforced that conclusion. Class members who were transferred to the Bronx Development Center, pursuant to parental approval, were promised that they would be placed in the community within six to eight months. Of the 93 individuals placed in the Bronx Developmental Center since 1977, 63 are still there and one has died.[26/] The defendants' additional arguments in favor of transitional placements - that certain individuals should acquire skills in a moderate sized facility or should be tested in such a facility before they are placed in small residences - are unpersuasive. The evidence shows that the same skills can be taught just as well,

if not better, in group homes as in larger facilities. Because class members have great difficulty generalizing skills they have learned in one environment to apply them in a different environment, placement in a transitional facililty may, in fact, retard their development.

Defendants have failed to show that the special needs of any group of class members cannot be best served in facilities of 10 beds or fewer. Their main argument is that approximately 400 persons, who constitute about 17% of the class members still residing in institutions, cannot be placed because of severe medical problems necessitating special placement arrangements. Defendants have not offered any individualized medical evaluations of these class members to justify this statement. Indeed, they concede that no such assessments have

been done.[27/] Rather they make sweeping unsupported generalizations of the medical needs of all the multiply handicapped persons at Willowbrook and at Flower Hospital.

The facts show, however, that almost all of these clients are not precluded from placement in small community settings. Many of the multiply handicapped residents at Willowbrook are so classified because of physical handicaps, such as blindness, epilepsy, non-ambulation or deafness. As defendants admitted, class members with these types of physical handicaps already reside in the community. Almost all of the other medically involved residents have medical conditions that can be controlled in a community setting. Common complications are seizures, cardiac problems, scoliosis, contractures, cerebral palsy,

chewing and swallowing difficulties and respiratory problems. As defendants acknowledge, persons with similar medical problems have been successfully placed in group homes in New York, as well as in other states.

The court recognizes that there are class members who, like anyone else, may need hospitalization from time to time or who, because of an illness or medical complication, may need longterm hospital care. Dr. Lorincz identified less than a dozen of such individuals at Willowbrook, and the Deputy Director of Willowbrook agreed than only a "handful" of residents were unsuited for community placement. Lyn Rucker saw four individuals in that category at Flower Hospital, and Dr. Kugel, the Director of Flower Hospital, opined that perhaps fifteen Flower Hospital clients should not be placed.

It is a huge and unwarranted leap, however, to conclude that unspecified medical complications that may preclude immediate placement of a few individuals should justify defendants' sweeping modification of placements for all 2400 institutionalized class members.

From the testimony, the court concludes that the overwhelming percentage of multiply handicapped clients who are not in need of hospitalization would not benefit from placement in moderate sized facilities instead of community group homes of 10 or fewer. Their specific medical needs can be met just as well in the community. Often, as Dr. Lorincz testified, their medical needs can be met relatively easily by training direct care staff or by providing the home with adaptive equipment. Some clients need regular visitation by

medical personnel, and in a few limited cases the provision of staff with medical qualifications. In light of the better care and better staff accountability in small group homes and the clients' greater opportunity there for enriched living experiences, the multiply handicapped clients should be placed in small residential settings.

Individuals with behavior problems including violent and self-abusive clients and those who chronically run away from home, can also benefit from placement in small community settings. Providers in New York, as well as providers in other states, routinely place these clients in the comunity. In fact, these types of clients are better served in small community settings, for staff there can give them more concentrated attention, and their problems are not

further aggravated by their being kept in large groupings. Intensive behavior modification programs, as illustrated by Lyn Rucker's videotape of such a program in Nebraska, can be set up very appropriately in a community setting.

We address the defendants' second argument. They claim that the scarcity of available property in New York City makes the task of developing enough community placements, as currently defined by the Consent Judgment, overwhelmingly difficult, if not impossible, and that the pace of community placement is therefore unconscionably slow. It is the obligation of the Facilities Development Corporation ("FDC") and the New York City County Services Group of OMRDD to search for property that OMRDD can acquire, lease, or on which OMRDD can construct facilities. As a consequence

of the extreme housing shortage in New York City, the available sites these organizations have been able to find for class members have dropped markedly. In the past three years OMRDD has opened only 131 of the 262 sites it had planned for New York City. Defendants point out that at the current rate of placement, community placement of remaining class members will take twenty years. They are bold enough to assert that under the present circumstances Section V(4) of the Consent Judgment has become an "instrument of wrong."

Upon this point defendants contend that the search for community residences for non-ambulatory non-self-preserving class members has been particularly difficult. Most of the state's community residences are constituted as intermediate care facilities for the mentally

retarded ("ICF/MR's") under Title XIX of the Social Security Act of 1935, as amended, 42 U.S.C. § 1396 ("Medicaid program"). Under the Medicaid program the federal government pays 50% of the cost for community residences and the state and/or locality pays the balance. The difficulty is that in order to obtain federal funds, community residences with less than 15 beds, housing any individual incapable of self preservation,[28/] must meet the stringent requirements of the institutional section of the National Fire Protection Association Life Safety Code. Most apartments and homes are not designed to house these types of individuals, and accordingly most small residences do not meet the stringent institutional code standards. According to the defendants, the FDC's search for facilities of 10 or fewer beds for the

non-ambulatory non-self-preserving population therefore has been routinely unsuccessful. Although all facilities that house more than 15 individuals must also meet the stringent institutional code requirements, regardless of the capacities of the residents, the defendants contend that the larger facilities are more likely to be compliant with code standards.

Additional difficulties in placing class members cited by defendants are community opposition and restrictions imposed by New York Mental Hygiene Law § 41.34 (McKinney Supp. 1981-82), commonly known as the "Padavan Law." Many neighborhoods oppose the development of community facilities for the retarded because of unfounded fears of child safety and a possible negative impact on local property values. Expression of

these fears has caused OMRDD to lose several sites already acquired. The Padavan Law provides a mechanism by which communities can voice opposition to community facilities of 14 residents or fewer, first via Community Planning Boards, then to the Commissioner of OMRDD and finally in the state courts. While the defendants acknowledge that the law is helpful in providing a mechanism for dealing with community resistence, they complain that the procedures outlined in the Law further slow the time-consuming process that the state undergoes in opening each community facility.[29/] The court agrees with their complaint, but notes that the Padavan Law is a self-imposed delay.

The court likewise takes judicial notice of the current housing shortage in New York City and recognizes that defend-

ants have recently encountered some difficulties in obtaining sites because of that shortage. A modification of the time schedule for community placement to account more realistically for impediments to placement is warranted. Accordingly, the court will extend the deadline for transferring Willowbrook class members to community facilities from April 1, 1981 to April 1, 1985.

The effect of the housing shortage has not been as devastating as defendants claim, however, and in part defendants have brought their difficulties upon themselves. Consequently, current circumstances do not present such hardship as would warrant modifying the Consent Judgment's 10-bed/15-bed community placement size limitation.

Defendants have introduced no evidence to show that the housing short-

age in New York City is a permanent impediment. In fact, the only evidence submitted suggests either that the housing shortage is easing somewhat or that OMRDD is already managing to overcome its effects. In the past fiscal year OMRDD located only 28 residences. In this year 57 new community residences designed to accommodate approximately 450 persons will become available in the New York City area alone, and other 88 units, housing approximately 700 persons, are anticipated for fiscal year 1982-83. For the first time in the New York City area, construction of new group homes on vacant sites, which is not necessarily more expensive or time-consuming than leasing or acquiring existing facilities, is being tried by defendants. They have begun as program to construction 10-bed group homes for non-self-preserving

individuals, which will accommodate at least 80-100 residents and possibly as many as 170-180. Defendants acknowledge that the program can and should be expanded. Moreover, the housing shortage is not as far-reaching as is claimed. According to past-Commissioner James Introne there are enough or nearly enough residential sites "in the pipeline" to meet the court's community placement requirements in Staten Island and Brooklyn and probably enough in Queens. (T. 2781). The only real crunch in housing is located in Manhattan and the Bronx which the defendants could alleviate, as discussed infra, by relaxation of the state's "County of Origin" rule. The defendants have also introduced no evidence to show that they cannot obtain sites for self-preserving clients, who under the Medicaid program do not require

community residences meeting the institutional Life Safety Code. In fact, Commissioner Introne acknowledged that housing is available for these individual. (T. 2780-81).

It seems clear that the shortage of sites does not result solely, or even primarily, from the Consent Judgment's size limitation. To a significant extent defendants have unnecessarily created their own obstacles to placement as outlined below.

1. Creation of unnecessary size prescriptions. Defendants have limited the focus of their search to houses and apartments capable of accommodating 8-10 clients, concededly much more difficult to find than properties in the 4-6 bed range.

2. Failure to hire sufficient site selection staff. Defendants have

only two full-time site searchers for all of New York City. Hiring only two sire-searchers is not a concerted enough effort to conclude that appropriate sites cannot be found, considering that two years ago for a brief period defendants hired six site searchers.

3. Failure to explore adequately the possibility of an equivalency system as a method of procuring funds for residences for non-self-preserving clients. Defendants claim that the population must difficult to place is the non-self-preserving. In light of the significance they attach to this assertion, the court is disappointed that defendants have failed to identify the number of non-self-preserving clients remaining to be placed.[30/] However, based on the severity of retardation and the serious physical handicaps of many class members,

the court is willing to accept the defendants' claim that the number of institutionalized non-self-preserving class members is large. It does not follow, though, that the Consent Judgment's size limitation blocks these individuals' placement. The National Bureau of Standards of the United States Department of Commerce has developed a fire safety equivalency system for use in group homes as an alternative to the more rigid proscriptions of the National Life Safety Code. Instead of automatically applying the strict institutional code to residences housing non-self-preserving clients, the equivalency system takes into account the characteristics of clients housed in the residence -- for instance, the mix of non-ambulatory and ambulatory clients -- and the response capability of staff. The equivalency

system is available for New York State to adopt, with or without any changes the state may believe appropriate, and after obtaining the approval of the Department of Health and Human Services, to utilize for certification of Medicaid-funded facilities. The importance of this system is that its use permits certification of a greater number of facilities for non-self-preserving clients.

The defendants maintain that they are interested in the possibility of using the equivalency system, but they assert they cannot use it at the present time and consequently are using a more limited "waiver" system. Even assuming that defendants are correct, their contention that the Life Safety Code presents a permanent impediment to developing group homes is erroneous. The most that can be said for this argument

is that the Code presents a temporary stumbling block and no more. Therefore, modification of the Judgment on this ground would be premature until the defendants have fully explored the usefulness of the equivalency system. Even without the equivalency system, Medicaid-certification of group homes for non-self-preserving clients is not impossible. In a survey defendants conducted for United Cerebral Palsy, they were able to certify approximately 64 of 90 3-bed apartments. Moreover, as defendants concede, a construction program is a viable alternative, and they are able to construct apartments for non-self-preserving residents that pass muster.

4. Failure to consider alternatives to Medicaid funding. Defefndants' concerns about Medicaid requirements are

primarily financial. The Life Safety Code applies only to facilities federally funded. If defendants allocated certain state funds to cover the cost of facilities for non-self-preserving clients, they could develop their own equivalency system that would not need federal approval.

Surprisingly enough, defendants were unaware of other avenues of federal support besides Medicaid funding. They did not know that federal funds are available under § 2176 of the Omnibus Budget and Reconciliation Act of 1981, 42 U.S.C. § 1396 n(c), to provide for personal care, case management, home habilitation, respite care and other services for severely handicapped clients in virtually any community setting provided that those clients would need an ICF/MR level of care without such ser-

vices. For example, these funds could be used to expand the state's family care program.[31/]

5. Failure to relax the State's "County of Origin" Rule. OMRDD operates under a self-imposed "County of Origin" rule which mandates that clients will only be placed in the borough or county from which they were originally committed to Willowbrook. Although the rule has the salutory effect of dissipating community opposition to placement, relaxation of the rule, particularly for clients originally from Manhattan and the Bronx, seems imperative. Placement in these boroughs is much more difficult than in other areas in the state, and the "County of Origin" rule makes no intrinsic sense for many class members, as for example, non-correspondent clients (those who have no active family members to

represent their interest) or those whose family members have moved from the area or are willing to have them placed further away in return for better care. While community opposition is a problem that must be faced, the court does not believe the opposition is sufficiently pervasive to preclude placement of Bronx and Manhattan class members into areas where there has been no substantial difficulty in extablishing community residences. Relaxation of the "County of Origin" rule, like the other untried alternatives, should be attempted before any drastic modification of the present Judgment.

Costs of community placement are not an issue here. Although defendants seem to emphasize costs in support of their claim, it is sufficient to point out that the defendants have failed to

show that the cost of placement in facilities with 10 beds or fewer is unreasonable or burdensome. In fact, Commissioner Slezak acknowledged that cost is not a problem confronting OMRDD in developing community placement for class members. Moreover, it has been established that community placement in either size facility is cheaper than keeping class members in institutions.

B

In view of the evidence adduced, the legal requirements for the modification of the Consent Judgment, as requested by the defendants, simply do not exist. The standard for modification is a finding of changed and unforeseen conditions creating a grievous wrong. The leading authority is United States v. Swift & Co., 286 U.S. 108 (1983). In

that case the defendants sought a modification of an injunction prohibiting them in an antitrust suit from engaging in the sale of meat or groceries. The modification would have permitted the companies to re-enter the grocery business. Mr. Justice Cardozo, in reversing the lower court's order granting the modification, said:

> No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.

Id. at 119. And again:

> What was then solemnly adjudged as a final composition of an historic litigation will not lightly be undone at the suit of the offenders, and the composition held for nothing.

Id. at 120. Under similar circumstances the Court reaffirmed the teaching of Swift in United States v. United Shoe Machinery Corp., 391 U.S. 244, 248 (1968), where it said:

> a decree may be changed upon an appropriate showing, ... [but] that it may not be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree ... have not been fully achieved.

Subsequently, in 1977, the Second Circuit, citing Swift, held that to succeed the movant must show that the decree is not properly adapted to accomplish its purpose and "that under no circumstances can a constitutionally valid plan be wrong" from the decree. Chance v. Board of Examiners, 561 F.2d 1079, 1086 (2d Cir. 1977). If would seem to be elementary that a party cannot show changed conditions created by his own misconduct,

or by a change in its own theory or thinking as justifying modification. The Third Circuit said in Mayberry v. Maroney, 558 F.2d 1159, 1163 (3d Cir. 1977):

> The Commonwealth may not now artificially create its own "changed circumstances," and thus relieve itself from a free, calculated and deliberate choice, by offering a substitute remedy which provides a lesser safeguard against the injuries complained of on behalf of the class. Obviously this alternative remedy would be more convenient for the Commonwealth.

Nor have the defendants, as suggested by them, shown an impossibility of performance in support of their claims. Finally, as stated in Ackerman v. United States, 340 U.S. 193, 198 (1950), a party to a judgment cannot be relieved

> because hindsight seems to indicate to [it] that [its] decision ... was probably wrong. ... There must be an end to litigation someday, and

> free, calculated, deliberate choices are not to be relieved from.

The court concludes that the defendants have failed to show exceptional circumstances or any grievous wrong as a basis for relief. Consequently, the motion for modification of the Consent Judgment will be denied.

IV

Closely allied to their motion to modify the Consent Judgment is the defendants' motion to vacate this court's Order of October 22, 1979, which, in relevant part, reads as follows:

> that the defendants shall place the Gouverneur transferees presently residing at Flower Fifth Avenue Hospital in the community in residential facilities of no more than six (6) residents each; and it is further
>
> ORDERED, that commencing September 11, 1979, at least

> one-half (1/2) of all Gouverneur transferees residing at Flower Fifth Avenue Hospital who are placed in the community shall be placed in residential facilities of no more than three (3) residents each; and it is further
>
> ORDERED, that this Order shall be re-evaluated by the parties not later than September 11, 1980, with respect to its appropriateness for and effects upon said Gouverneur transferees ...

Approximately two and a half years later 110 to 115 class members still remain at the Flower Hospital and only 26 have been moved to valid community facilities. It must be emphasized that all the parties agreed to this October 22, 1979 Order. In asking the court to relieve them of the obligation they assumed, the defendants emphasize their concern about the medical risks of small placements for Flower Hospital clients and their inability to find suitable sites. As discussed previously, the

court rejects the claims that the medical needs of Flower Hospital clients require placements in larger facilities. On the contracry, the court finds that the Flower Hospital clients can best be served in facilities of 6 beds or fewer. As for the unavailability of sites, the defendants' efforts have been unimpressive. In their short-lived search for 3-bed and 6-bed units, defendants looked only in the Bronx and Manhattan, the two boroughs with the fewest number of available sites, and they confined their search to a radius of one-quarter mile from six hospitals, which, as established by expert testimony, was unnecessarily restrictive. Moreover, contributing to defendants' failure was Commissioner Introne's memorandum of February 20, 1981, which illegally ordered a halt to OMRDD's efforts to develop 3-bed units.

Defendants claim that the testimony at the hearing demonstrates that the 3-bed/6-bed Order is no longer "properly adapted to accomplishing its purposes," citing King Seely Thermos Co. v. Alladin Industries, Inc., 418 F.2d 31 (2d Cir. 1969). That case, which involved a trademark infringement consent judgment, is inapposite because it does not refer to changed conditions. There the original judgment contained two conditions which were unnecessary at the time to accomplish its purposes of protecting the plaintiff. Accordingly those conditions were removed. King Seely did not eliminate the ex post facto "grievous wrong" requirement of Swift, supra. Here the conditions of the October 22, 1979 Order are necessary to accomplish the purposes of the Order and of the Consent Judgment and these purposes have not been accom-

plished as they had been in King Seely. Flower Hospiral class members are profoundly retarded, non-ambulatory and subject to a wide variety of other handicapping conditions. There has been no change in the circumstances or any exceptional conditions justifying the vacation of this Order. The court notes, however, that a recent change in Medicaid reimbursement disallows federal funding for facilities that have fewer than four beds. 42 C.F.R. § 435.1009(e). To permit defendants to receive such federal assistance, the court modifies the second paragraph of the October 22, 1979 Order by substituting "four (4)" for "three (3)".

The foregoing constitutes the court's findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

Conclusion

In summary, the court (1) declares the defendants in non-compliance with the terms and conditions of the Consent Judgment and hereby orders them to comply with all of said terms and conditions with all deliberate speed, and extends the deadline for compliance with the community placement provisions from April 1, 1981 to April 1, 1985; (2) will appoint a special master to monitor compliance; (3) denies defendants' motion to modify the 10/15 bed community placement limitation; (4) denies defendants' motion to vacate the court's Order of October 22, 1979, and modifies the 3/6-bed requirement to a 4/6-bed requirement; and (5) allows plaintiffs' counsel costs and reasonable attorney's fees

pursuant to 42 U.S.C. § 1988, to be hereafter determined.

SO ORDERED.

Dated: Brooklyn, N.Y.,
April 28, 1982

John J. Bartels
United States District
Judge

FOOTNOTES

1/ Prior reported decisions in this case appear at 357 F. Supp. 752 (E.D.N.Y. 1973); 393 F. Supp. 715 (E.D.N.Y. 1975); 409 F. Supp. 606 (E.D.N.Y. 1976); 438 F. Supp. 440 (E.D.N.Y. 1977); 456 F. Supp. 85 (E.D.N.Y. 1978); 466 F. Supp. 487 (E.D.N.Y.), aff'd, 612 F.2d 644 (2d Cir. 1979); 492 F. Supp. 1099 (E.D.N.Y. 1980); 492 F. Supp. 1110 (E.D.N.Y.), rev'd, 631 F.2d 162 (2d Cir. 1980). Other opinions and orders were issued in this case, 72 Civ. 356/357, on March 5, 1976, March 8, 1976, March 10, 1976; March 30, 1976; February 7, 1977; February 8, 1977; March 10, 1977; June 10, 1977; September 7, 1977; October 11, 1977; October 17, 1977; March 21, 1978, aff'd, 596 F.2d 27 (2d Cir. 1979); March 28, 1978; April 26, 1978; September 15, 1978; September 24, 1978; September 29, 1978; October 2, 1978; June 6, 1979; October 22, 1979; Sepbember 9, 1980, aff'd, 661 F.2d 910 (2d Cir. 1981).

2/ Willowbrook is a complex of several dozen buildings. Residents currently live in Buildings 5, 6, 9, 10, 11, 21, 23, 25, 32, 77, 12, 13, and 15. Buildings 12, 13, and 15 comprise the Karl Warner Complex managed by United Cerebral Palsy on behalf of the State of New York.

3/ Class members also live in other developmental centers not directly

referred to at the hearing. State-run developmental centers include Suffolk, West Seneca, O.D. Heck, Broome, Westchester, Letchworth, Syracuse, Wassaic, Wilton and Monroe Developmental Centers. Private institutions include Greenwood, Crystal Run, Hebrew Academy, Housing for the Disabled, and Margaret Chapman facilities.

4/ Fact witnesses for plaintiffs were: Margaret Loomis, consultant to the American Civil Liberties Union ("ACLU") and past staff member of the Willowbrook Review Panel; Mary Sullivan, Masnhattan Borough Representative of the Consumers' Advisory Board ("CAB"); Anthony Pinto, CAB representative on the Willowbrook Incident Review Committee; Ann Nehrbaur, Chairperson of the CAB; Barbara Gac-k, Director of Intermediate Care Facilities for St. Christopher Home; Ida Rios and Sandra Magri, mothers of class members; Martin Van Hall, Midlevel Supervisor at Bronx Developmental Center; and Albert Pfadt, Administrator of the Willowbrook toilet-training program.

5/ Fact witnesses for defendants were: Dr. Harold Brandwein, Acting Deputy Director for Treatment Services at Willowbrook; Peter Behrle, Chief Budgeting Analyst, Office of Mental Retardation and Developmental Disabilities ("OMRDD"); Mary Delaney, Senior Consultant and Physical Therapist, OMRDD; Chuck Devane, Director of Human Resources Manage-

ment, OMRDD; Anthony DiNuzzo, Director of Office of ICF/MR Survey Operations; Cora Hoffman, Special Assistant to the Commissioner, OMRDD; Ed Matthews, New York State Facilities Development Corporation; Richard Roberts, Speech Pathologist of Willowbrook Deaf-Blind Program; James Walsh, Deputy Director for Institutional Administration at Willowbrook; Joseph Weingold, former Executive Director of New York State Association for Retarded Children ("NYSARC"); and Dr. Philip Ziring, Chairman of Pediatrics at Morristown Memorial Hospital and former Deputy Director of Clinical Services at Willowbrook.

6/ Section B requires in pertinent part that:

> 1. Defendants shall provide living facilities which afford residents privacy, dignity, comfort and sanitation. This shall include but not be limited to:
> ... adequate toilet paper, soap, towels, linen and bedding; ... separate clean and dirty linen storage areas.
> ...
> 3. Every building shall be kept clean, odorless, and insect-free at all times .... In particular, lavatory areas are to be cleaned as often as necessary every day, and bathtubs shall be cleaned after the bath of each resident.

Section H requires in pertinent part that:

> 5. Dining areas and food storage, preparation, and distribution shall be in compliance with state and local sanitation requirements. There shall be sufficient dishes and utensils for all residents, which shall be thoroughly cleaned between uses.
>
> 6. Food shall be prepared by methods that preserve nutritive value, served at normal temperatures, and protected from contamination in transport and storage.

7/ In the main kitchen alone Raymond Watts, who surveyed Willowbrook for amicus, counted twenty violations of the Food and Drug Administration Standards for food service operations.

8/ To cite just a few examples of the deplorable sanitation in Willowbrook bathrooms: (1) In July 1981 the Quality of Life Committee, an internal auditing group, reported on the Central Client Bathroom in Building ICF/32 and found a severe odor of feces, urine and mildew, feces on one of the shower stall floors, feces smeared on one toilet, another toilet unflushed and no soap (P.Ex. 156); (b) in June 1981 Dr. Clements toured Building 6. He testified that he observed a pile of feces in a shower, a toilet seat covered with feces and urine and toilet stalls without toilet tissue. (T. 90; P.Exs. 70A-2 &

70A-3); (c) Commissioner Schwaninger testified that in January 1982 she saw a bathroom in Building 9 with eight toilets, ever one of which was without toilet paper, was filled with feces and with feces and urine stains on the toilet seats. (T. 5670-71; P.Ex. 70C-167); (d) Lyn Rucker testified that on September 6, 1981 many of the bathrooms in Building 77 were unflushed and were filled with feces. The bathrooms reeked, and there were vomit and feces in the toilet stalls. (T. 1850-51).

9/ Two of the defendants' witnesses, Dr. Ella Curry, Director of Willowbrook, and James Walsh, Deputy Director for Institutional Administration at Willowbrook, acknowledged that the level of cleanliness at Willowbrook is unacceptable. (T. 2699-2700; P.Ex. 259). Audits conducted by the State repeatedly cite serious sanitation deficiencies. (See, e.g., P.Exs. 1, 153, 154, 155, 156, 158, 160, 161, 162, 253, 258).

10/ Dr. Clements reported a particularly distressing incident. A resident in Building 8 lunchroom was soaked in urine and with a puddle of urine beneath him. When asked to clean it up, an employee reported that it was not her job. Meanwhile, the resident dropped his spoon in the puddle, picked it up and continued to eat with in. (T. 106).

11/ Sections B and R require in pertinent part that living quarters:

[B1] shall include, but not be limited to:

- accessible, private and easily usable toilets and bathing facilities, including specialized equipment for the physically handicapped;

- accessible and easily usable sinks and drinking facilities;

...

- individual bed and dresser or storage place;

- attractive, comfortable and spacious living and sleeping areas;

- attractive and normalizing furnishings and leisure equipment, including materials to reduce noise level;

- normal temperatures and adequate ventilation;

...

2. Living areas shall be sectioned and partitioned so that no more than eight residents live or sleep in one unit. Programming and working areas shall be quiet, appropriately designed and conducive

to programming. Architectural barriers which impede living and programming for handicapped residents shall be corrected or removed. Residents shall be encouraged to decorate their living areas and furniture.

[R1] All necessary steps shall be taken to correct health and safety hazards, including the covering of

> radiators and steam pipes in a manner to protect residents from injury, the prompt repair of broken windows, and the removel of cockroaches and other insects and vermin.
>
> ...

6. Defendants shall establish and maintain a program of adequate maintenance of buildings and equipment which shall include prompt elimination of existing maintenance backlogs.

...

8. Floors in living or sleeping areas other than dining or bathroom areas shall be provided with carpets or rugs, consistent with a pleasant, clean, quiet and safe residential environment.

12/ Section A(7) provides:

> Residents shall be provided with

clean, adequate and seasonally appropriate clothing, including shoes and coats, which shall be readily accessible for residents' use. Such clothing shall be comparable in styles and quality with clothing worn by persons of similar age and sex in the community.

13/ The great majority of class members awaiting placement is profoundly or severely retarded with an equivalent function level between that of a twelve-month-old infant and a two-year-old child. Moreover, some display maladaptive behaviors, many are non-ambulatory, and some have other physically handicapping conditions, such as blindness, deafness, scoliosis, asthma, respiratory problems, cerebral palsy, and cardiac and renal conditions.

14/ State audits in March 1981 and September 1981 confirm egregious clothing deficiencies at Willowbrook. In March the auditors from OMRDD found non-compliance with five of seven standards measuring compliance with the clothing provisions of the Consent Judgment. In September, the Willowbrook Quality of Life Committee found six of seven standards out of compliance.

15/ Section D provides, in pertinent part, that:

> 1. Each resident shall have an individual plan of care, development and services (referred

to hereafter as the "development plan"), which shall be prepared and re-evaluated at least annually by an interdisciplinary team of direct care and appropriate professional staff, as described in this judgmewnt, after comprehensive diagnostic testing and evaluative screening, with the assistance of the resident, his or her parents, relatives or guardian. The development plan shall include all education, speech, physical therapy or other plans required by this judgment. The development plan shall be regularly reviewed by the team, at least quarterly.

2. Each development plan shall describe the nature of the resident's specific needs and capabilities, his or her program goals, with short range and long range objectives and timetables for their attainment. The development plan shall provide for six (6) scheduled hours of program activity per weekday, designed to contribute to the achievement of objectives established for each resident, and each resident shall receive six hours of such program activity per weekday. ... The development plan shall state criteria for release to less restrictive settings, including criteria and projected date for release, discharge, or transfer to a community placement, and programming necessary to achieve such release, discharge or transfer.

16/ Seventy-five of Willowbrook's highest functioning clients attend workshops in the community.

17/ Ms. Sullivan evaluated attendance at 110 case conferences she attended at Willowbrook between March 30, 1980 and June 12, 1981. At 90 conferences staff members were missing: in 59 instances direct care staff, in 32 instances nurses, and in 21 instances program staff. At 16 conferences both program and direct care staff were missing, and 23 out of 45 times a doctor, scheduled to attend a conference, was absent. Ms. Sullivan also evaluated the number of written staff evaluations that were not completed. Of a total of 97 conferences, at 83 written staff evaluations were missing; 45 times, 3 or more evaluations were missing; and 17 times, 5 or more evaluations were missing.

18/ Section K requires, in pertinent part, that:

> 1. Individualized physical therapy services on a regular basis (including 7 days a week where needed) shall be provided to those residents who can benefit therefrom, including all cerebral palsy residents and all non-ambulatory residents and shall include positioning, feeding programs, self-ambulation programs, intervention and activation ...
>
> 2. Sufficient numbers of quali-

fied staff and personnel shall promptly evaluate all non-ambulatory and physically handicapped residents to determine the number of wheelchairs (including electric), braces, orthopedic shoes, walkers, crutches, positioning equipment, bolsters, helmets, adaptive chairs, etc., that are needed. Such equipment shall be ordered and/or constructed and issued as quickly as possible. Carpenters shall be employed to make adaptive equipment, tailored to the physical needs of individual residents.

19/ Section B7 provides, in pertinent part, that:

> 7. Toys and equipment shall be readily accessible to residents during waking hours.

Section G provides, in pertinent part, that:

> 1. There shall be a recreation program at Willowbrook which meets the recreational needs of each resident, as set forth in his or her development plan described in section D, as to design of equipment, functional level, and physical or visual handicap. There shall be enough recreational equipment to provide adequate recreation services to all residents. There shall be special emphasis on equipment for lower functioning residents. The recreation program shall conform

as closely as possible to normal community recreation activities, in particular in terms of equipment, age and sex grouping, facilities and surroundings.

2. Unless there is a medical order to the contrary, a minimum of two hours per day of recreation activities shall be provided for each resident, and weather permitting, recreation activities shall take place outdoors.

20/ Section H provides, in pertinent part, that:

1. Consistent with their capabilities and handicaps, residents shall be taught to feed themselves and shall be fed both hot and cold foods and beverages in a normal fashion with due regard for personal hygiene (including washing hands of residents before and after every meal), use of utensils, appropriate quantities of food, appropriate dining room surroundings, meal schedules which correspond to normal community standards with no less than 30-45 minutes allotted for each resident's meal. Where appropriate, residents shall be taught to eat in leisurely family style and to choose their own quantities and items according to individual tastes and preferences. Direct care staff shall be trained in and shall utilize power feeding techniques.

2. A nourishing, well-balanced nutritionally adequate diet shall be provided ... there shall be a mechanism for ensuring that residents who require special diets receive them.

21/ Willowbrook resident "V" was on a prescribed ground food diet. His diet card indicated he was not to be given extra bread. Staff did not consult the diet card and gave him cubed meat and a roll. Staff unsuccessfully attempted the Heimlich maneuver and tried to save him by using the unit's resuscitator, but the resuscitator was inoperative. The Special Incident Review Committee found that dietary cards were not used on that unit, and supervisors were not properly instructed on the dietary card procedures. (P.Ex. 79).

22/ Section C provides, in relevant part, that:

1. Each resident at Willowbrook shall receive appreciable and appropriate attention each day from the direct care staff in his living unit, whose primary responsibility shall be the care and development of each resident. ...

2. Willowbrook shall employ and maintain sufficient therapy aids at the grade 7 and 9 levels to ensure that the following numbers shall be present and on duty:

a) During the hours of the day and evening when residents are awake:

1) One therapy aid for every four residents in buildings primarily for residents who are children non-ambulatory or multiply handicapped, and for those residents receiving intensive psychiatric care;

...

3) One therapy aid for every resident receiving an intensive behavior modification program;

4) One therapy aid for every six residents for all residents and buildings not covered above;

b) During sleeping hours, an average of one therapy aid for every twelve residents on an institutional basis.

...

7. Sufficient mid-level supervisors, i.e., grade 11 and grade 13 therapy assistants, or registered or practical nurses where

appropriate, shall be employed to ensure that there will be one such person present on duty per 24 residents on both the first (day) and second (evening) shifts, and one such person present on duty for every 48 residents on the third (night) shift. ...

23/ See paragraph 9 of the Consent Judgment specifying that this court retains jurisdiction.

24/ Section V4 provides, in relevant part, that:

> [D]efendants shall develop and operate or cause to be developed and operated, at least 200 new community placements to meet the needs of Willowbrook's residents and of the class. For purposes of this section ... a 'community placement' shall mean any non-institutional residence in the community in a hostel, half-way house, group home, foster care home, or similar residential facility of ... 10 or fewer beds for [the severely and profoundly retarded], coupled with a program element adequate to meet the resident's individual needs.

Section V7 provides that:

> The community placement plan may recommend that additional community facilities and programs be developed and operated during the six months following recom-

mendation of the plan, and shall recommend, by type and size of facility and program, the development and operation of a specified number of community facilities and programs, together with a recommendation for their development and operation.

25/ The group studied in the article cited by Sue Allen Warren was primarily individuals who are moderately retarded.

26/ In the six years since its opening, only 15 of the 46 class members placed at Nina Eaton Center have been placed into the community. Since its opening ten months ago, no residents from Sullivan County ARC have been placed into the community.

27/ Section V(2) requires individual evaluations to determine which community placement is best suited for each resident. The defendants have not identified any specific class members at Willowbrook for whom placement into facilities larger than 10 beds is appropriate.

28/ A non-self-preserving individual is defined as someone who is non-ambulatory or otherwise incapable of taking appropriate action to escape a fire.

29/ Ms. Hoffman outlined fourteen steps the state takes to obtain a community residence. These include multiple approvals at various stages

in the process by several state agencies. It takes approximately 9-10 months to lease a residential site, and 12 to 13 months to acquire a site. As a result some available residential sites have been lost.

30/ Commissioner Introne acknowledged that he did not know now many non-self-preserving class members remain to be placed in the Borouqhs of Bronx and Manhattan. Similarly, both Thomas Shirtz, OMRDD's Deputy Commissioner in Charge of New York City operations, and Anthony DiNuzzo, head of the ICF/MR survey team were unaware of the number of non-self-preserving clients that remain to be placed.

31/ Defendants acknowledge that family care is a highly appropriate placement for class members. It also presents some advantages to the state. The approval process is less time-consuming than other community placements, and family care homes are not required to meet the institutional Life Safety Code.

APPENDIX D

Relevant Sections of
Final Judgment on Consent
April 30, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN, et al.,	:	
and	:	
PATRICIA PARISI, et al.,	:	FINAL JUDGMENT
Plaintiffs,	:	72 Civ. 356/ 357
-against-	:	
HUGH L. CAREY, et al.,	:	
Defendants.	:	
UNITED STATES OF AMERICA,	:	
Amicus Curiae.	:	

Upon the joint motion of plaintiffs, defendants, and the United States, it is hereby ordered, adjudged and decreed:

1. This Court has jurisdiction of the subject matter and of the parties hereto, and the complaints state claims under 42 U.S.C. § 1983. On April 10, 1973 this Court entered an opinion finding that Willowbrook's residents had a constitutional right, under the Eighth and Fourteenth Amendments, to protection from harm. Subsequently, a trial was held on plaintiff's request for permanent relief. Without admission and prior to final findings of fact and conclusions of law, the parties have now agreed to entry of a consent judgment, specifying additional steps, standards and procedures necessary to secure the constitutional right to protection from harm for Willowbrook's residents and members of the class.

* * * *

The steps, standards and procedures contained in Appendix "A" hereto are not optimal or ideal standards, nor are they just custodial standards. They are based on the recognition that retarded persons, regardless of the degree of handicapping conditions, are capable of physical, intellectual, emotional and social growth, and upon the further recognition that a certain level of affirmative intervention and programming is necessary if that capacity for growth and development is to be preserved, and regression prevented.

* * * *

APPENDIX "A"

Steps, Standards,
and Procedures

* * * *

A. Resident Living

1. Residents shall be provided with the least restrictive and most normal living conditions possible. This standard shall apply to dress, grooming, movement, use of free time, and contact and communication with the outside community, including access to educational, vocational and therapy services outside of the institution. Residents shall be taught skills that help them learn how to manipulate their environment and how to make choices necessary for daily living.

2. In addition, the staff shall prepare residents to move from 1) more to less structured living; 2) larger to smaller facilities; 3) larger to smaller living units; 4) group to individual residences; 5) segregated from the community to integrated with the community living and programming; 6) dependent to independnt living.

* * * *

V. Community Placement

1. Defendants shall take all steps necessary to develop and operate a broad range of non-institutional community facilities and programs to meet the needs of Willowbrook's residents and of the class. Within six years from the date of this judgment Willowbrook shall be reduced to an institution of 250 or fewer beds to serve the needs of residents who require institutional care and who come from the geographic area of Staten Island. The Review Panel shall annually evaluate progress towards this objective.

* * * *

4. Within 12 months of the date of this judgment, defendants shall develop and operate, or cause to be developed and operated, at least 200 new community placements to meet the needs of Willowbrook's residents and of the class. For purposes of this section, except for placement in hostels currently under construction or development, which in no event shall exceed 15 beds, a "community placement" shall mean a non-institutional residence in the community in a hostel, halfway house, group home, foster care home, or similar residential facility of fifteen or fewer beds for mildly retarded adults, and ten or fewer beds for all others, coupled with a program element adequate to meet the resident's individual needs.

* * * *

9. The primary goal of Willowbrook and of the Department shall be to ready each resident, with due regard for his or her own disabilities and with full appreciation for his or her own capabilities for development, for life in the community at large. To this end, defendant shall develop a full program of normalization and community placement with a full complement of community services.

APPENDIX E

Order of the District Court, October 22, 1979 (Flower Order)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - x

NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN, et al.,

and

PATRICIA PARISI, et al., : 72-C-356 72-C-357

Plaintiffs,

-against- : ORDER

HUGH L. CAREY, individually and as Governor of the State of New York, et al.,

Defendants.

UNITED STATES OF AMERICA,

Amicus Curiae.

- - - - - - - - - - - - - - - - x

The Willowbrook Review Panel having issued a formal recommendation dated May 24, 1979, with regard to Flower Fifth Avenue Hospital, and the defendants having objected to said formal recommendation and requested a hearing before

this Court thereon, and a hearing having been held before this Court and evidence and testimony having been heard solely on Section D(3) of said formal recommendation requiring community placement of Gouverneur transferees in residential facilities of no more than three (3) residents each except upon written waiver by the Willowbrook Review Panel, and upon the completion of the taking of evidence and testimony the parties having agreed in open court on September 11, 1979, to a resolution of said issue, after due deliberation it is

ORDERED, that the defendants shall place the Gouverneur transferees presently residing at Flower Fifth Avenue Hospital in the community in residential facilities of no more than six (6) residents each; and it is further

ORDERED, that commencing September 11, 1979, at least one-half (1/2) of all Gouverneur transferees residing at Flower Fifth Avenue Hospital who are placed in the community shall be placed in residential facilities of no more than three (3) residents each; and it is further

ORDERED, that this Order shall be re-evaluated by the parties not later than September 11, 1980, with respect to its appropriateness for and effects upon said Gouverneur transferees; and it is further

ORDERED, that the provisions of this Order shall continue in full force and effect until otherwise ordered by this Court.

Dated: Brooklyn, New York
October 22, 1979

United States District Judge

83-213

IN THE

Supreme Court of the United States

October Term, 1983

NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN, INC., *et al.*,

and

PATRICIA PARISI, *et al.*,

Petitioners,

v.

HUGH L. CAREY, individually and as Governor of the State of New York, *et al.*,

Respondents.

UNITED STATES OF AMERICA,

Amicus Curiae.

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondents
Two World Trade Center
New York, New York 10047
(212) 488-3385

MELVYN R. LEVENTHAL
Deputy First Assistant
Attorney General

PETER H. SCHIFF
Acting Attorney-in-Chief
Appeals and Opinion

FREDERICK K. MEHLMAN
CAREN BRUTTEN
Assistant Attorneys General
Of Counsel

Questions Presented

1. Whether the Court of Appeals was correct in holding that the framers of a consent decree—entered on behalf of residents of a state institution for the mentally retarded—intended as their primary goal the reduction of the institution's population to 250 through the transfer of residents to more humane facilities as quickly as possible?

2. Whether the Court of Appeals was correct in holding that if defendant state officials prove that residences accommodating between ten and fifty beds are a professionally acceptable choice for the care of mentally retarded persons, the district court may not direct defendants to only develop residences accommodating ten to fifteen beds?

Parties In Courts Below

The parties to the proceedings below, in addition to those named in the caption, include the following named plaintiffs-appellees: Benevolent Society for Retarded Children, Willowbrook Chapter of the New York State Association for Retarded Children; Lara R. Schneps, by her father Murray B. Schneps; Nina Galin, by her mother Diana Lane McCourt; Anthony Rios, by his father Jesus Rios; David Amoroso, by his mother Rosalie Amoroso; Rose Evelyn Cruz, by her father Franciso M. Cruz; Barry Friedman, by his father Melvin Friedman; Lowell Scott

Isaacs, by his father Jerome W. Isaacs; Antoinette Magri, by her mother Sandra Magri; Anselmo Clarke, by his mother Estella Clarke; Nelson Agosto, by his aunt and next friend Lucilia DeJesus; Frances Breen, by his sister Mary Morganstern as committee of her person and property; John Duffy, by his next friend Robert L. Feldt, Esq.; Evelyn Cruz, by her father Francisco Cruz; Bonnie Rose, by her mother Anne Rose; Mario Nervaez, by his mother Carmen Nervaez; John Doe, by his mother Jane Doe; and Steven Rosepka, by his father Ben Rosepka. (Patricia Parisi sues through her mother Lena Stevernagel).

Additional defendants-appellants below included Zygmond L. Slezak, Commissioner, New York State Office of Mental Retardation and Developmental Disabilities; Thomas Shirtz, Deputy Commissioner, OMRDD; and Ella A. Curry, Director, Frances Ryan, Deputy Director, Clinical Services, and James Walsh, Deputy Director, Institutional Administration, Staten Island Developmental Center (Willowbrook).

NYSARC, Inc., the only corporation, has no parent companies, subsidiaries or affiliates.

TABLE OF CONTENTS

TABLE OF CASES

83-213

IN THE

Supreme Court of the United States

October Term, 1983

NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN, INC., *et al.*,

and

PATRICIA PARISI, *et al.*,

Petitioners,

v.

HUGH L. CAREY, individually and as Governor of the State of New York, *et al.*,

Respondents.

UNITED STATES OF AMERICA,

Amicus Curiae.

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

Statement of the Case

This lawsuit, filed in March, 1972, challenged overcrowding and other inhumane conditions and practices at Willowbrook Developmental Center, a facility for mentally retarded persons, operated by respondent state officials. Plaintiffs were the New York State Association for Retarded Children, Inc. (NYSARC), other voluntary organizations, and mentally retarded children and adults

who sued on behalf of all persons residing at Willowbrook. Although a preliminary injunction was entered,[1] the lawsuit was settled before a decision on the merits through a comprehensive consent judgment entered in April, 1975.[2] All litigation since that date[3] has entailed no more than efforts to enforce, interpret and modify that settlement agreement.

The proceedings below began with a motion by defendant state officials (respondents here) to modify the consent judgment's terms relating to overcrowding. The original decree required that Willowbrook's population be reduced to 250 residents. This was to be accomplished in part through the relocation of Willowbrook residents to community facilities accommodating no more than 15 beds "for mildly retarded adults," and no more than 10 beds "for all others." Through a supplemental consent order, defendants had also

1. *New York State Association for Retarded Children, Inc.* v. *Rockefeller*, 357 F. Supp. 752, 764-65 (E.D.N.Y. 1973). The district court there held that residents of Willowbrook have a constitutional right to "protection from harm" and conditions that comport with "basic standards of human decency." The court's order prohibited seclusion of residents and required the provision of additional hospital care, additional building maintenance and the hiring of additional staff. *Id.*, at 768-69.

2. The Consent Judgment contains a comprehensive listing of "Steps, Standards and Procedures" that defendant state officials must adopt and follow. The consent judgment is extraordinarily detailed. For example, it provides that Willowbrook residents shall "be fed both hot and cold foods and beverages in a normal fashion with due regard for personal hygiene (including washing hands of residents before and after each meal), use of utensils, appropriate dining room surroundings, meal schedules which correspond to normal community standards, with no less than 30-45 minutes allotted to each resident's meal." Joint Appendix in Court of Appeals, p. 44.

3. The Court of Appeals listed the previously reported ten district court and three appeals court decisions entered in this case. Appendix to Petition for Writ of Certiorari (hereinafter "Appendix") A-3, note 1. Many additional unreported opinions and orders were entered by the district court.

agreed to provide, on a trial basis only, community placements of three to six beds for a small group of multiply handicapped Willowbrook residents who had been transferred to Flower Fifth Avenue Hospital. Defendants, in their motion to modify, sought greater flexibility: although they planned many small facilities they sought authority to develop community facilities accommodating up to 50 residents.

Defendants maintained that the modifications sought were necessary in light of difficulties actually experienced in locating and purchasing sites suitable for community residences. In the period 1979-82 defendants were able to open only 131 of 262 sites they had planned for New York City. (Appendix, C-92) The shortfall resulted from obstacles to strict compliance with the decree not fully appreciated when the decree was entered. First, New York's "extremely tight housing market" resulted in a scarcity of sites. Second, a new state statute, providing procedures through which a community may protest and resist the opening of a facility scheduled to house 14 or fewer retarded persons, caused delays resulting in a loss of sites (New York Mental Hygiene Law § 41.34, McKinney Supp. 1982-83). Third, federal and state life safety code requirements for structures housing non-ambulatory persons impeded and frustrated apartment and building acquisitions. The solution, defendants argued, was to develop in some cases somewhat larger facilities. Defendant Office of Mental Retardation and Developmental Disabilities proposed to construct, in fiscal year 1983: 18 community residences of 4-10 beds each; 15 residences of 11-24 beds each; 2 residences of 25-34 beds each; and 3 residences of 35-50 beds each. Note 13, Court of Appeals decision, Appendix, A-21.

Defendants offered the expert testimony of professionals responsible for the State's program for mentally retarded persons and responsible for the State's program at Willowbrook. Defendants also adduced testimony from outside experts. All of these professionals testified that plaintiff class members could be well cared for and served in facilities accommodating between 10 and 50 residents. They also testified that a three to six bed limitation for the residents of Flower Fifth Avenue Hospital would deny those persons necessary medical supervision.

The district court found that the framers of the consent judgment had established as an "essential purpose" of the consent judgment the placement of Willowbrook residents in accordance with the 10/15 bed limitation. (Appendix C-80) It found that the obstacles to achieving this limitation advanced by defendants were insubstantial. (Appendix, C-95—C-97) The district court also adopted the testimony of plaintiffs' experts that the Willowbrook class members would be better served in very small community facilities; that the magic numbers were ten and fifteen, not fifty.

The Court of Appeals reversed. It held that the consent judgment's "primary objective" was to empty Willowbrook, "a mammoth institution." (Appendix, A-29) It described defendants' evidence as a "strong showing" (Appendix, A-21) "unquestionably establishing" (Appendix, A-34) that this primary objective could not be realized unless defendants were granted the modification they sought.

The Court of Appeals further held that the district court applied the wrong standard to the expert testimony

it received from the parties. It was not "appropriate" for the district court "to specify which of several professionally acceptable choices should have been made." *Youngberg* v. *Romeo*, 457 U.S. 307, 321 (1982). It concluded that defendants should be upheld if their professional mental health care providers demonstrated that their policies for the care of Willowbrook residents were the result of "professional judgment in fact exercised."

Summary of Argument

I

The court below held that under *United States* v. *Swift & Co.*, 286 U.S. 106 (1932) and *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244 (1968), a modification to a decree should be permitted if it advances the primary purpose of the decree. The appeals court held that the primary purpose of the consent judgment was to reduce Willowbrook's population. It found that the proposed modification—community facilities housing up to fifty residents —would advance that primary purpose and it therefore authorized the modification. Petitioners argue that the appeals court misperceived the consent judgment's primary purpose. They insist that the decree's primary purpose was to create community based facilities of ten to fifteen beds; that the proposed modification therefore abrogated rather than advanced the decree's essential provision and should not have been granted. Petitioners' argument thus turns on an interpretation of the consent judgment and findings of fact. The appeals court holding has no constitutional

significance and entails no departure from controlling decisions of this Court. Certiorari should therefore be denied.

II

Under *Youngberg* v. *Romeo,* 457 U.S. 307 (1982), defendants need only establish that they in fact exercised professional judgment when they sought permission from the district court to develop community facilities accommodating up to fifty beds. Petitioners insist that this standard improperly denies the district court discretion to accept the testimony of plaintiffs' experts advancing alternative approaches to the care of mentally retarded persons. The principle under challenge has several times been decided by this Court and was properly applied by the appeals court. Certiorari should therefore be denied.

Argument

I

One of two standards controls whether a request to modify an injunctive decree will be granted. If the modification is an attempt to frustrate or eliminate the underlying objective of the decree then the modification must be supported by "nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions." *United States* v. *Swift & Co.,* 286 U.S. at 119. However, when the requested modification is premised on a claim and proof that the decree has failed to accomplish its essential purpose and the modification is necessary to realize

the purpose, a very different standard controls. In such cases, the moving party must demonstrate that a "better appreciation of the facts in light of experience indicates that the decree is not properly adapted to accomplishing its purposes." *King-Seeley Thermos Co.* v. *Aladdin Industries Inc.*, 418 F. 2d 31, 35 (2d Cir. 1969). This standard controls in such cases because "a continuing decree of injunction directed to events to come is always subject to adaptation as events may shape the need." *United States* v. *Swift & Co.*, 286 U.S. at 114.

In *Swift*, the modification proposed would have eliminated the decree's prohibition against monopolistic practices and was viewed by the Court as an attempt to obtain "revers[al] under the guise of readjustment." 286 U.S. at 119. Movants were therefore required to demonstrate that a continuation of the decree would be "oppressive" and result in a "grievous wrong." In contrast, in *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244, 249 (1968), the Court permitted the requested adaptation because it grew out of the parties' experiences operating under the decree and advanced the decree's underlying purpose, achieving "workable competition."

Petitioners' claim that the Court of Appeals ignored *Swift* is baseless. (Petition for Writ of Certiorari, pp. 21-22) The parties and both courts below all agree that *Swift* and *United Shoe* control this case. They also agree with the above statement of controlling principles. But they disagree on the application of these cases and principles to the facts of this case.

The district court found that the placement of Willowbrook residents in small community facilities was an "essential purpose of the Consent Judgment." (Appendix, C-80) It viewed defendants' proposed modifications as an effort to abrogate that purpose. It therefore applied the more stringent standard of *Swift* and *United Shoe*: it asked whether the modification sought—community placements in facilities of up to 50 beds—was necessary to avoid a "grievous wrong." *United States* v. *Swift Co.*, 286 U.S. at 119. The court found that defendants could not satisfy this standard and the modification was denied. (Appendix, C-111)

The Court of Appeals held that the "primary objective" or the "comprehensive goal" of the decree was "to empty such a mammoth institution as Willowbrook" (Appendix, A-29) "transferring . . . [its] population whose squalid living conditions this court has already recited, to facilities of more human dimension as quickly as possible" (Appendix, A-25). It therefore applied the standard more favorable to the moving party: whether the proposed adaptation was based on the parties' experiences operating under the decree and whether it was in furtherance of the decree's primary objective of reducing Willowbrook's population. The Court of Appeals held that defendants satisfied this standard and authorized the proposed modification. Evidence found insufficient by the district court under the more stringent standard was described by the Court of Appeals as a "strong showing" that "the modification was essential to attaining the goal of [reducing Willowbrook's popu-

lation] at any reasonably early date." (Appendix, A-29 and A-21)[4]

Thus the case brought to this Court is essentially a dispute over what the framers of the consent judgment intended as their primary objective. State officials insist that the framers' primary objective was to reduce dramatically Willowbrook's population. Petitioners ask this Court to hold that there was an alternative primary objective. This question, while of obvious importance to the parties, is merely a dispute over findings of fact. It has no constitutional significance or precedential value beyond this case and should not be reviewed here.[5]

4. The elimination of overcrowding at Willowbrook has been and continues to be a critical objective of the parties and the consent judgment. In 1969, three years before the lawsuit was filed, Willowbrook housed 6,200 persons; by the time the suit was filed in March, 1972 it housed 5,700. In 1972, defendants closed admissions to Willowbrook and by December, 1972 the population was reduced to 4,727. *New York State Association for Retarded Children* v. *Rockefeller*, 357 F. Supp. 752, 755-56 (E.D.N.Y. 1973). In 1982, there were 1,369 residents in Willowbrook. (Appendix, A-21)

5. Plaintiffs also argue that permitting modifications to a decree "will lead to unnecessary and protracted litigation" and will force plaintiffs to trial in complex cases. *Petition for Writ of Certiorari*, pp. 23-24. Of course, defendants' principal response is that controlling precedents, *Swift* and *United Shoe* permit modifications, when the appropriate standard is satisfied. In addition, the consent judgment expressly provides for the retention of jurisdiction "for the purpose of construing, implementing, enforcing, or considering motions to amend the Consent Judgment." *New York State Association for Retarded Children* v. *Carey*, 596 F. 2d 27, 32 (2d Cir. 1979). Moreover, defendants are accountable and must daily labor under the provisions of the decree. If defendants are not able to obtain appropriate modifications they—not plaintiffs—will avoid settlement of complex disputes. Finally, plaintiffs' disdain for motions to modify is disingenuous: they have supported modifications to the consent judgment when it was in their interest to do so.

II

Defendant mental health care professionals are daily confronted with controversial, complex, perplexing and emotionally charged issues and decisions. It is too easy to second guess their professional opinions; plaintiffs will often find experts willing to testify that they prefer one form of care to another—in this case that three, six, ten or fifteen bed facilities are superior to ten to fifty bed facilities. Allowing such second guessing places "an undue burden on the administration of institutions" like Willowbrook, "and also . . . restrict[s] unnecessarily the exercise of professional judgment as to the needs of residents." *Youngberg* v. *Romeo,* 457 U.S. at 322. See cases collected in *Youngberg,* 457 U.S. at 322, n. 29. This Court has therefore unanimously held that it is inappropriate for a district court to "specify which of several professionally acceptable choices should . . . [be] made," for residents in a state facility for the mentally retarded. *Id.,* at 321. It is only when defendants abdicate their responsibilities—when they fail or refuse to exercise their professional judgment—that the courts may intervene. *Cf. Swann* v. *Charlotte-Mecklenburg Bd. of Ed.,* 402 U.S. 1, 15-16 (1971) (school authorities must develop constitutionally adequate plans of school desegregation; courts will adopt plans developed by plaintiffs only if defendants abdicate this responsibility).

These clearly controlling principles were correctly applied by the Court of Appeals to this case. Almost 90% of Willowbrook's residents awaiting placements are "severely and profoundly retarded individuals who . . . have

developmental levels between that of an infant and a two year old." (Appendix, C-73) The appropriately trained professionals responsible for New York's statewide program for mentally retarded persons and the appropriately trained professionals who daily care for Willowbrook's residents, as well as other experts called by defendants:

> [W]ere in general agreement that a range of facilities of different sizes up to 50 beds would best serve the Willowbrook class. The quality of care and relationships between staff and residents, it was testified, would not suffer in facilities of . . . [such] size. Moreover, community placements of less than ten beds, according to . . . [two experts] could not be staffed with physicians and therapists necessary for disabled class members and those with special health risks.[6]
> (Appendix, A-24)

The district judge did not consider this expert testimony in light of *Youngberg* because *Youngberg* was decided after the district judge rendered his opinion. The Court of Appeals therefore remanded the case for a finding of whether:

> [T]he views expressed by defendants' experts as to the propriety of the 50 bed limitation constituted 'professionally acceptable choices' or were 'such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.' [*Youngberg*, 457 U.S. at 323]
> (Appendix, A-35)

If on remand the district court finds that defendants satisfied this standard, they must be given the authority—

6. Additional expert authorities supporting defendants' view were identified by the Court of Appeals. Appendix, A-35, n. 19.

the latitude—to care for Willowbrook residents in facilities accommodating up to fifty beds. This was a correct statement and application of the *Youngberg* standard. Certiorari should therefore be denied.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondents

MELVYN R. LEVENTHAL
Deputy First Assistant
Attorney General

PETER H. SCHIFF
Acting Attorney-in-Chief
Appeals and Opinion

FREDERICK K. MEHLMAN
CAREN BRUTTEN
Assistant Attorneys General
Of Counsel

September 22, 1983